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**OBSTRUCTIONIST NATIONAL PROTECTIONISM IN THE EU
QUALITATIVE ANALYSIS OF MEMBER STATES' COMPLIANCE WITH THE CJEU's
JUDGMENTS IN 'GOLDEN SHARE' CASES**

Ganza, Jelena

Awarding institution:
King's College London

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**OBSTRUCTIONIST NATIONAL
PROTECTIONISM IN THE EU: QUALITATIVE
ANALYSIS OF MEMBER STATES'
COMPLIANCE WITH THE CJEU'S JUDGMENTS
IN 'GOLDEN SHARE' CASES**

BY

JELENA GANZA

A thesis submitted to the Dickson Poon School of Law,
King's College London in fulfilment of the requirements for
the degree of Doctor of Philosophy

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Jelena Ganza
King's College London
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Abstract

The European Union (EU) is a voluntary organisation based on the Treaties which have been democratically approved by the Member States (MSs). The MSs have willingly committed themselves to progressive integration by eliminating barriers to fundamental freedoms in order to build an ‘ever closer union among the peoples of Europe’. However, in order to address other strong conflicting interests and commitments at the national level, the governments of the MSs have raised barriers to fundamental freedoms called Golden Shares (GSs). Due to conflicts of supranational and national interests, the MSs have resisted removing GSs, so the matter has been brought to the highest legal authority of the EU – the Court of Justice of the European Union (CJEU). The CJEU has assessed the compatibility of GSs with EU law on a total of sixteen occasions, which has resulted in fifteen condemning judgments. Following the Court’s ruling, the MSs are obliged to comply, as non-compliance with a judgment is a serious infringement which signifies that the MSs are crossing the red line by severely disregarding the limits of their discretion under their voluntarily supranational commitments. Despite the significant compliance obligations and the growing GS case-law, little is known about whether the EU enforcement system succeeds in ensuring timely and effective compliance with GS-related judgments. This study seeks to close this gap. It evaluates national post-judgment compliance procedures in order to demonstrate how and under what conditions MSs comply and whether a decision to keep GSs post-judgment could be seen as an unsuitable compliance strategy leading to non-compliance. This study is a fact-finding mission aimed at solving the empirical puzzle about whether the MSs deliberately resort to post-judgment actions and strategies aimed at limiting or containing the effects of the GS rulings. It seeks to reveal whether such a compliance strategy is in line with supranational obligations or whether it could trigger obstructionist protectionism.

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Abbreviations

<i>AEM</i>	<i>Azienda Elettrica Municipale Società per Azioni</i>
<i>AG</i>	Advocate General
<i>AGM</i>	Annual General Meeting
<i>AktG</i>	<i>Aktiengesetz</i>
<i>BAA</i>	British Airports Authority
<i>BGBI</i>	<i>Bundesgesetzblatt</i>
<i>BOE</i>	<i>Boletín Oficial del Estado</i>
<i>BSCH</i>	<i>Banco Santander Central Hispanoamericano Sociedad Anónima</i>
<i>CEM</i>	Control Enhancing Mechanism
<i>CIMPOR</i>	<i>Cimentos de Portugal Sociedade Anónima</i>
<i>CJEU</i>	Court of Justice of the European Union
<i>CMLR</i>	Common Market Law Reports
<i>CGD</i>	<i>Caixa Geral de Depositos</i>
<i>CPR</i>	Commission Press Release
<i>DL</i>	Decree-Law
<i>Do</i>	<i>Diário da República</i>
<i>DPCM</i>	Decree of the President of Council of Ministers
<i>EAP</i>	Economic Adjustment Programme
<i>EC</i>	European Community
<i>ECB</i>	European Central Bank
<i>ECR</i>	European Court Reports
<i>EdF</i>	<i>Electricité de France Société Anonyme</i>
<i>EdP</i>	<i>Energias de Portugal Sociedade Anónima</i>
<i>EEC</i>	European Economic Community
<i>Elf</i>	<i>Société Nationale Elf-Aquitaine</i>
<i>ENI</i>	<i>Ente Nazionale per l'Energia Elettrica Società per Azioni</i>
<i>EU</i>	European Union
<i>FDI</i>	Foreign Direct Investment
<i>GALP</i>	<i>Galp Energia, SGPS, Sociedade Anónima</i>
<i>GS</i>	Golden Share
<i>IMF</i>	International Monetary Fund

<i>KonTraG</i>	<i>Gesetz zur Kontrolle und Transparenz im Unternehmensbereich</i>
<i>KPN</i>	<i>Koninklijke KPN Naamloze vennootschap</i>
<i>LQP</i>	<i>Lei Quadro das Privatizações</i>
<i>MoU</i>	Memorandum of Understanding
<i>MSs</i>	Member States (of the EU)
<i>OJ</i>	Official Journal of the European Communities
<i>OECD</i>	Organisation for Economic Cooperation and Development
<i>PT</i>	<i>Portugal Telecom SGPS Sociedade Anónima</i>
<i>SOE</i>	State-Owned Enterprise
<i>TEC</i>	Treaty Establishing the European Community
<i>TEU</i>	Treaty on the European Union (Maastricht Treaty)
<i>TFEU</i>	Treaty on the Functioning of the European Union
<i>TI</i>	<i>Telecom Italia Società per Azioni</i>
<i>UK</i>	The United Kingdom
<i>VW</i>	<i>Volkswagenwerk Aktiengesellschaft</i>

**Obstructionist national protectionism in the EU: qualitative
analysis of Member States' compliance with the CJEU's judgments in
"Golden Share" cases.**

PART I. INTRODUCTION

This introductory part seeks to provide a general overview of the fundamental issues related to the main question of this thesis: is the EU enforcement system effective in ensuring compliance with GS judgments? Due to the number and breadth of the subjects concerned with the question of compliance with EU law in general and given the multiplicity of issues and interests surrounding the GS topic in particular, it is necessary to specify not only what this study is about but also what it is not about. Sections 1 and 2 of this introduction address this important question. Section 3, in turn, considers the multiplicity of issues and interests related to the GS topic while reflecting on the interplay between unity and diversity within the EU. This section reviews the very complex scenario that links conflicting values and interests at both European and national levels. It problematises the setting of this study by contrasting the predominantly neoliberal ideas behind the single market project and the conflicting desire of the MSs to protect public interests in strategic industries via GSs. Section 4 explains what GSs are and how the protectionist aims of these measures could be achieved without imposing barriers to free movement and without having to resort to non-compliance post-judgment. This clarification is crucial to demonstrate that the decision to maintain GSs post-judgment could be seen as a matter of political choice which is inconsistent with voluntary commitments, both at supranational and national levels, and could be seen as particularly grave misconduct given the availability of legitimate alternatives to achieve the stated public policy aims. Section 5 contrasts the overall compliance trends with EU law and with the judgments on GSs. It then discusses the literature on compliance and demonstrates how this study contributes to it. Section 6 introduces the main research hypotheses and theorises on factors that could influence compliance. It concludes with an outline of the research design.

1. Outline

The CJEU is the highest legal authority of the EU. It is regarded as the principal guarantor of the rule of law within the Union. The EU enforcement system aims to bring erring MSs before the CJEU in order to guarantee due compliance with supranational obligations (Adams *et al* 2013: 2; Alter 2001). The CJEU is seen as being the most influential international body (Alter 1999) and the most effective supranational judicial body in the history of the world (Stone Sweet 2004). Despite the pivotal role that compliance with the CJEU's judgments plays for the Union to attain its aims and objectives, the effects of the rulings beyond the courtroom remain unclear. Indeed our knowledge of MS compliance is like a black hole (Weiler 1991: 2463). The said black hole also applies to the post-adjudicative compliance of MSs with judgments on the so-called Golden Share cases. The GS-related case-law reveals a deeply entrenched conflict between the promotion of supranational interests and the protection of diverging national interests. Hence, an analysis of compliance with GS rulings could provide an invaluable insight into the effectiveness of the EU enforcement system when it is applied to the policy area where the MSs have to balance the obligation of compliance with supranational obligations against the countervailing obligation to protect national interests.

The GS-related jurisprudence has a substantial impact on the development of EU law and on the interpretation of the Treaty provisions on capital movement. It is seen both by the Commission and scholars as path-breaking, significant, historic and as a landmark. It is frequently addressed by academics who approach this body of judicially inspired EU law from different perspectives. However, despite the importance of the GS-related jurisprudence for the development of EU law, the Court's adjudicative success has never been tested. The Court's jurisprudence on GSs has never been the subject of a contextual study¹ which methodically explores this body of case-law through the prism of the MSs' post-adjudicative compliance. Little is known about how MSs address GSs judgments, and which actions they take (and how soon they undertake them) in order to comply. What is missing is a narrowly focused qualitative contextual analysis revealing how the CJEU's judgments on GSs are applied and enforced in typical practice across the MSs. This study aims to close this gap.

¹ The necessity for such contextual research assessing post-judgment compliance was frequently identified in academia, *e.g.*, BÖRZEL (2003: 220); BÖRZEL (2001; 820); STONE SWEET (2010).

This study sets out to explore whether the general enforcement mechanism enshrined in the TFEU is effective and adequately suited to guarantee prompt compliance with GS rulings. This study is a fact-finding mission that approaches post-judgment compliance as a narrative of events, in order to establish how MSs comply, what the ultimate outcome of the enforcement action is, and if a pattern can be distinguished in compliance behaviour which emerges in relation to GS-related judgments. This study is an attempt to understand the content and motivation for national compliance actions and the difficulties for EU law enforcement which could arise during this process. This research considers whether the offending governments are determined to legislate in a manner aiming to keep the overruled GSs. The study aims to demonstrate whether the GS-related jurisprudence could be one of the policy areas characterised by particular compliance dynamics and whether non-compliance might remain a significant problem.

Here, it is pertinent to emphasise that defining and measuring post-judgment compliance is a challenging task. It is difficult to apply empirical evidence to a theoretical framework in order to arrive at definitive conclusions since numerous issue-related factors and dependent variables are involved in the assessment. Therefore, the present study has a narrow focus on the MSs' practice in complying with GS rulings to reveal specific dynamics of compliance characteristic solely of this body of case-law. GSs are a very specific subject, and this study seeks to reveal whether some MSs tend to behave very differently when it comes to compliance with CJEU's judgements.

The European Union is a supranational organisation founded in law with the ultimate aim of building an 'ever closer union among the Peoples of Europe'.² Its MSs committed themselves democratically and voluntarily to join the EU. Membership obliges the MSs to progressively achieve integration by eliminating barriers to the fundamental freedoms guaranteed by the Treaties in order to meet the Union's aims and values. At the same time, the MSs could be characterised as having significant diversity of national economic and societal traditions, coupled with significant and persistent differences in corporate law and in national policies related to strategic industries (such as energy and public services). All this diversity produces a range of interests and values which the MSs are obliged to protect, such as the protection of strategic public interest and public security. To accommodate

² Preamble to the Treaty of Rome 1957.

this ‘value diversity’, the Treaties provide for ‘a broad leeway to safeguard national interests’ (Lenaerts 2013: 29), allowing the MSs to avoid compliance with fundamental freedoms in order to protect legitimate interests. Consequently, as the EU strives for unity while acknowledging the existing national diversity, some ‘misfit’ between existing European and national law is unavoidable. Simply put, non-compliance with EU law could to a certain extent be acceptable. However, too much diversity would undermine the aim of unity that underlies the Union (Howarth, Sadeh 2010: 922; Townley 2014: 3), so despite their profound diversity the MSs have voluntarily committed themselves to embrace the overarching aims of the Union and a core nucleus of shared values while striving for ‘ever closer’ unity.

In order to resolve the conflict of national and EU interests and values, the MSs have delegated the task of monitoring and enforcing compliance with supranational law to the EU Commission (*e.g.* Moravcsik 1998; Pollack 2003; Tallberg 2002a). The Commission is the force committed to integration, pressing the MSs towards attaining the Union’s objectives of unity. The democratically elected governments of the MSs have substantial powers to bargain with the non-elected and sometimes bureaucratic Commission in its pursuit of ‘more Europe’ and not to conform to some of its compliance demands. In cases where MSs resist removing barriers, which damage the core nucleus of shared EU values, the Commission could employ the enforcement system provided for in Article 258 TFEU. The procedure of Article 258 TFEU is a lengthy multi-stage negotiation process, based on compliance bargaining, which basically aims to talk the erring MS into conformity by giving it sufficient time to reach a friendly, out-of-court settlement with the Commission and adjust national laws so that they are compatible with or ‘fit’ EU rules. Given that only around 10% of all infringement cases are referred to the CJEU,³ it could be maintained that generally MSs strive to comply in order to avoid facing the Court. When the hard cases of non-compliance reach the judicial stage of the procedure, the CJEU strives to accommodate diverse national interests as far as possible and, ‘in so far as there are no national measures producing a protectionist effect (or having protectionist intent)’, MSs enjoy broad discretion for the protection of national interests (*e.g.* Lenaerts 2013: 29). However, in the area of the core nucleus of shared EU values, the Court must ensure uniformity, and so the conflict between the MSs’

³ European Commission COM(2007) 502 final, ‘A Europe of Results – Applying Community Law’, 5/9/2007, Brussels, p.4.

desire to protect national interests and the fundamental freedoms of the EU has usually been solved by the CJEU in favour of the latter (ibid).

After the case is referred to the Court, formal compliance bargaining between the democratically elected government and the Commission generally comes to an end, yet it can continue in parallel to the judicial discourses (Panke 2010: 38). However, all the bargaining ceases once the condemning judgment is issued and the ‘misfit’ confirmed, since the MS is legally bound to comply with the judgment and remedy the breach which has been upheld by the highest legal authority of the EU.

The MSs’ general duty to comply is enshrined in Article 4(3) TEU, the so-called ‘loyalty to the EU’ or ‘sincere cooperation’ principle. Pursuant to Article 4(3) TEU the EU institutions and the MSs have to ‘*assist each other in carrying out tasks which flow from the Treaties[...] take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union [and] refrain from any measure which could jeopardise the attainment of the Union’s objectives.*’⁴ The duty to comply with judgments of the CJEU is enshrined in Article 260(1) TFEU which states that MSs are explicitly obliged to take all the necessary measures and comply with binding judgments. The CJEU has no jurisdiction to oblige MSs to comply in any particular way or within a specified period of time,⁵ yet the MSs are obliged to initiate a compliance process immediately and comply *fully* as soon as possible.⁶ Hence, the MSs have accepted that the EU legislation that furthers integration of the single market ‘could be passed against their will, and yet be binding upon them’ (Lenaerts 2013: 16). If, despite the compliance obligations and sincere cooperation principle, the breach is not promptly remedied following the judgment, the Commission’s last resort to ensure compliance is to initiate a second round of infringement procedure under Article 260 TFEU, which foresees the imposition of financial penalties for non-compliance with a judgment issued under the first round procedure of Article 258 TFEU.

It is true that the CJEU’s judgments that identify a ‘misfit’ could hardly be sufficient to promote a wider domestic policy change single-handedly, particularly in cases where strong adaptation pressure is necessary to ensure compliance (ibid:

⁴ Previously Article 10 TEC, Article 5 EEC Treaty.

⁵ Case C-473/93 *Commission v Luxembourg* [1996] ECR I-03207.

⁶ Case C-387/97 *Commission v Greece* [2000] ECR I-05047, para.82; Case C-278/01 *Commission v Spain* [2003] ECR I-14141, para.27.

113; Conant 2002: 15; Graziano 2012; Panke 2010). The compliance pressures for greater change in domestic policy could come as a result of pressures from societal compliance proponents and interest groups which lead to reputational and electoral losses while also threatening to bring further legal actions in both national and EU courts (Börzel 2006; Panke 2010; Blauburger 2012). In addition, interested actors could foster policy change through the argumentative reframing of the relevant issue at stake (Panke 2010). In contrast to the actual dynamics of a greater change in domestic policy, a particular judgment addressed to the MS must formally be respected by the national government in its role of a voluntary signatory to the Treaty.

Given the voluntary and democratic basis of EU membership, non-compliance with a binding judgment of the highest legal authority of the EU constitutes a manifest and grave disregard of the MSs' supranational undertakings. Non-compliance with the CJEU's jurisprudence could undermine the credibility of the MSs' commitments under the Treaty and the authority of the Court, weaken confidence in the EU and the credibility of the single market,⁷ and deprive citizens and entities of their rights,⁸ subsequently limiting the effect of the EU enforcement system while putting into question the effectiveness and overall aims of the Union (e.g. Mastenbroek 2003). In this light, non-compliance post-judgment could be seen as a 'nuclear option' (Blauberger 2012: 109) or as a crossing of the red line.

In terms of compliance with GSs-related jurisprudence, a condemning judgment establishes why a particular GS is contrary to the Treaty. In its judgment, the CJEU confirms that such a protectionist measure, in its present form, is not suitable for the protection of the stated national interests and values. In this respect, the condemning GS judgment of the CJEU could be seen as limiting the unchecked diversity between national economic and societal traditions, forcing the MS to adapt and adjust accordingly for the sake of unity. Consequently, the supranational obligation to respect judgments of the highest legal authority of the EU would override the national interests claimed as justifications for an infringement of the Treaty. After the breach is judicially confirmed, the MS in question is liable for the infringement and is obliged to comply with the judgment even though the stated national interests and values could be undermined as a result of the removal of the

⁷ European Commission (2010) 'Internal market scoreboard', December 2009, no.20, p.7.

⁸ COM(2007) 502 final, *op. cit.*, p.4; European Commission (2010a) 'Internal market scoreboard', no.21, p.21.

GS. At the same time, declamatory judgments remain silent on the precise limits of the GS, its form and application that could be deemed compatible with supranational obligations. The interpretation of the judgement is left for the MSs and national courts, so the domestic authorities themselves must ensure that the new GS ‘fits’ with EU rules. Consequently, to accommodate value diversity at national levels, MSs could test the limits of the legality of the GS by making incremental changes to the overruled measures in order to further protect legitimate interests. Simply put, as far as the scope of this study is concerned, value diversity and the MSs’ obligation to protect national interest matter solely because non-compliance could be seen as testing the acceptable level of diversity in individual GS cases. When implementing incremental changes that could result in ineffective post-judgment compliance, the MS might be seen as trying to test the limits of legality in order to see how far it can go in its national diversity. This study sets out to demonstrate, that while the MSs tend to avoid openly resorting to outright non-compliance, they could employ other hard-to-track non-compliance tactics instead. This study demonstrates that factual non-compliance could be masked by different post-judgment compliance strategies aimed at avoiding the full compliance or full ‘regulatory surrender’ so that the ‘misfit’ would not cease to exist (Blauberger 2012: 111).

Over the course of one and a half decades, the MSs and the EU Commission have not been able to agree on the legitimacy of national protectionist measures called Golden Shares, so they have locked horns in a long-running battle. GSs are barriers to the single market and restrict the fundamental freedoms of capital movement and establishment guaranteed by the Treaty.⁹ In brief, GSs are special type of nominal share, special arrangement or law that grants its holder special control rights in a company limited by shares. These special rights are not available to ordinary shareholders and are generally created and held by the government allowing it ‘to pursue interests which do not coincide with the economic interests of the company concerned’.¹⁰ Simply put, GSs seek to preserve the influence of the state in privatised companies. Essentially they give the MSs special powers which are similar to the powers of a blocking minority shareholder, such as the power to veto certain decisions of a directors’ board at extraordinary general meetings.

⁹ Capital - Article 65 TFEU, Article 346 TFEU; Establishment - Articles 49 and 55 TFEU, *see ANNEX I* of this study, p.272. Treaty on the Functioning of the European Union, *O.J.*, C 83/47, 30/03/2010. New numbering of the Treaty Articles is used throughout this study.

¹⁰ Joined cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR I-9141, para.28.

Special rights reserved for the national authorities allow them to intervene in important decisions of the company, such as modifications to the company's articles of association, appointment of directors onto the company's boards, control over acquisitions or disposals of shareholdings which could lead to major restructuring operations and corporate actions like mergers and acquisition (M&As). Under general corporate law, such important decisions usually require a qualified majority or a super-majority of 75% of the share capital, meaning that a shareholding representing 25% or more of the share capital constitutes a blocking minority stake and its holder normally is a blocking minority shareholder (Ringe 2015: 407). Golden shares grant its holder influence and control which would be available to blocking minority shareholder. Therefore, even in instances of the full transfer of share ownership from public to private hands, definitive influence over such a company could still be executed through the use of GSs – and all this without having to pay for the blocking minority stakes in the company. The substance and a further definition of the GS concept will be further explored at a later stage of this introductory chapter.

GSs measures could be justified within the exceptions provided in the Treaty or by the compelling requirements in the general public interest (in particular with reference to public policy, security and health). Over the years the Commission has treated GSs cases as a priority, confirming that GSs represent 'substantial barriers to the smooth operation of the single market'¹¹ and are 'the most serious infringements',¹² they 'present the greatest risks [and have] widespread impact for citizens and businesses',¹³ and are 'crucially important from the standpoint of integration of the single market'.¹⁴ The significance of GSs lies in the fact that they are protectionist measures (which have a protectionist intent and effect) infringing the two fundamental freedoms of essential importance to the very existence of the Union that constitute part of the core nucleus of shared EU values. The battle to overturn GSs, which continues to this very day, has resulted in interest-driven

¹¹ COM(2001) 309 final, European Commission 18th Annual Report on Monitoring the Application of EU Law – 2000, p.18.

¹² COM(2003) 669 final, European Commission 20th Annual Report – 2002, p.12.

¹³ COM(2013) 726, European Commission 30th Annual Report – 2012, p.9.

¹⁴ COM(2002) 324 final, European Commission 19th Annual Report – 2001, p.16; SEC(2010) 1143 final, SWD, Situation in the Different Sectors, Accompanying document to the 27th Annual Report – 2009, p.262.

litigation seeking to overcome the political deadlock that has prevented further market liberalisation (Lenaerts 2013: 16).

Beginning from the first judgment handed down in 2000, the Commission has an almost undefeated record in proving that GSs are contrary to the Treaty. The CJEU had assessed the legality of implementation, application and maintenance of GSs on *eighteen*¹⁵ occasions (*sixteen* judgments assessed the compatibility of GSs with the Treaty including *one* judgment that has been referred for preliminary ruling,¹⁶ plus *one* judgment on the application of GSs to block a cross-border takeover¹⁷ and *one* more judgment assessed an MS's alleged non-compliance with a GS judgment¹⁸). The CJEU has confirmed that GSs could be justified by overriding public-interest grounds that aim to ensure that the public is not harmed. However, any such barriers must be reasonable and proportionate to the objectives pursued¹⁹ and, as GS jurisprudence demonstrates, passing the established test is (almost) mission impossible. The infringement proceedings under Article 258 TFEU, which assesses the compatibility of GSs with the Treaty, demonstrate that only in one instance out of sixteen were GSs found to be reasonable and proportionate. The CJEU has a final say on GS legality disputes, yet for GS jurisprudence to gain any practical importance, MSs are required to accept full legal responsibility for non-compliance and to remedy the breach.

GS-related case-law constitutes only a small fraction of the CJEU's jurisprudence, yet it is a politically sensitive issue that raises a number of important questions concerning the division of powers between the EU and the MSs, as well as related to the overall direction of the Union. Abundant questions have been raised by scholars in relation to the GSs and by the relevant case-law. These questions include why GSs are incompatible with EU law (*e.g.* Grundmann, Möslin 2003; Hopt 2010) and whether the Court has verged too far in its definition of a 'restriction' (*e.g.* Gerner-Beuerle 2012; Biondi 2010; Sanders 2008; Sørensen 2004; Herschinger *et al* 2011; Ringe 2011; Papadopoulos 2012). Other questions relate to whether GSs have a significant adverse economic impact on the operating performance of companies

¹⁵ See Table 2 of this study in Part III. Conclusions, Section 2. Findings.

¹⁶ Joined cases C-463/04 and C-464/04 *Federconsumatori v Comune di Milano* [2007] ECR I-10419.

¹⁷ Case C-196/07 *Commission v Spain* [2008] ECR I-00041.

¹⁸ Case C-95/12 *Commission v Germany* [2013] ECR I-0000.

¹⁹ Case C-174/04 *Commission v Italy* [2005] ECR I-4933, para.35; Case C-463/00 *Commission v Spain* [2003] ECR I-4581, para.68.

or on investors and financial market integration.²⁰ Others ask questions about the practical implications of GS rulings for the development of the fundamental freedom of capital movement, for the creation of a level playing field in European capital markets and for the European market for corporate control (Adolff 2002; Kronenberger 2003; Barnard 2010; Craig, de Búrca 2011; Hartkamp 2010). Another question raised is how these rulings affect ordinary shareholders' rights related to the design of corporate statutes and what the social implications are (Saam, Zumbansen 2007). Questions are also posed about whether and how the ability of GSs to block cross-border capital movements affects the EU market for corporate control. A final question is about how GS case-law promotes economic integration and the convergence of national economic traditions (*e.g.* Streeck 2009; Schweiger 2014) and why it challenges national co-ordinated market economies and whether and how it threatens industrial and electoral democracy (Dorussen, Nanou 2013; Komo, Villers 2009; Snell 2013). The questions are abundant and throughout this introduction a number of these contemporary and hotly discussed issues will be highlighted. However, these questions are raised only as subsidiary themes aiming to compliment the main thrust of the thesis. Given the number and breadth of questions that surround the GS issue and in order to avoid the danger of stretching the aims of this thesis, it is necessary to specify not only what this study is about but also what it is *not* about.

The purpose of this study is neither to contest the desirability nor the legality of GSs. Despite the fact that GSs represent a significant hindrance to the effective operation of the single market and that in all GS-related cases these measures have been found to constitute barriers to fundamental freedoms and that all but one of these measures could not be justified, this study adopts the view that GSs are not illegal *per se*. The starting position, therefore, is to remain neutral on the desirability and legality of such measures. However, since this study concentrates solely on GS-related case-law, the starting point is to acknowledge that the GSs which have been proven to be illegal by the CJEU represent judicially confirmed unjustified barriers to the fundamental freedoms.

Likewise, the purpose of this research is neither to examine in depth the reasons behind the introduction of GSs nor to evaluate their possible impact on the

²⁰ The empirical evidence on the economic impact of GSs is limited. *See e.g.* OXERA Report (2005), *Special rights of public authorities in privatised EU companies: the microeconomic impact*, p.iv,

functioning of the single market and the EU market for corporate control. Similarly, discussions on and the associated problems of the convergence of the EU market for corporate control and on the gradual disintegration of the stakeholder-oriented coordinated market economy model on the way towards a more liberal shareholder-oriented model are beyond the scope of this study. The aim of this study is not to assess the wider social and corporate costs and benefits that may arise from the use of GSs or from their subsequent repeal. It is also beyond the scope of this study to address the question of how well the CJEU has balanced the relevant EU and national interests when ruling on the GS issue. Neither is this study about GS-related judgments since these rulings have been extensively covered in academic contributions (Adolff 2002; Lustig, Weil 2002; Sørensen 2004; Herschinger *et al* 2011). To some extent, such a high level of attention could be due to the vital importance and key position of strategic industries – which have been subject to GS protection – in national economies.

It is true that such a unique level of public and academic attention²¹ could also be caused by the scale and volume of foreign direct investments (FDI) which were precluded by GSs. The problematics of these impeded transactions, the related legal disputes and the significant national public interests involved have been widely discussed by the press, the public, and politicians alike. This study also highlights some of the relevant points of the takeovers that have been directly or indirectly affected by GSs which became subject to enforcement proceedings. However, this study is neither about free movement of capital nor about cross-border M&As. Since this study is not about the economic impacts and outcomes of M&As, it remains neutral concerning the desirability for the establishment of an EU market for corporate control, while also acknowledging that the neoliberal model of a shareholder-oriented market economy and the associated level playing field which encourages M&As could have both negative and positive impacts on value creation.²² The subject of M&As, their desirability in the free market and their impact on value creation are discussed in more detail below. At this stage, it is necessary to emphasise that this study is not about M&As, yet it reveals that

²¹ BÖRZEL (2003: 208) argued that non-compliance with the EU law rarely triggers any public debate.

²² *E.g.* SCHERER (1988); also CROUCH, STREECK (1997) demonstrated that state-imposed constraints to free market forces can have beneficial effects on economic competitiveness. *Also* HUMPHERY-JENNER (2014) demonstrated that antitakeover provisions (such as GSs) could be seen as both negative and positive for value creation.

reluctance to remove GSs could have a detrimental effect on capital movement, precluding transactions that would otherwise have gone through. After delineating the subjects that are not the primary concern of this thesis it is now necessary to specify the exact aim of this study.

2. The Aim of this Study and Research Question

The CJEU has an almost undefeated record in proving that GSs are contrary to the Treaty. Such a pattern of success lies in synergy with the perception that the EU judicial and enforcement systems are effective in combating non-compliance (Beach 2005; Panke 2010; Conant 1998; Conant 2002). It has been argued that ‘a judicially inspired rule of law is universally respected, widely obeyed, and largely contained’ (Conant 1998). A condemning GS judgment addressed to a particular MS would primarily oblige the respective government to refrain from the continued use of the incompatible provisions. Ideally, the spirit of continuous integration behind the ‘ever-closer union’ maxim, coupled with the fundamental importance of loyalty to the EU principle, would also imply that the MS must not only promptly remedy the confirmed breach, but also refrain from maintaining any analogous GSs or implementing similar measures aimed at substituting the overruled provisions. Ideally, efficient post-judgment compliance would also trigger significant legal adaptations and policy reforms at national level, prompting the MS to review analogous GSs which have not yet become subject to infringement procedures, but which have the potential of being put under the Commission’s scrutiny in the future. What has been said above is an idealistic best case scenario of post-judgment behaviour which could qualify as ‘regulatory surrender’ or *comprehensive compliance* in good faith. Such scenario of comprehensive compliance with GSs-related judgments would go in synergy with the recent policy studies which found that the judicially inspired EU law ‘triggers broader reforms at the national level’.²³ Likewise, since the core objective behind judicial policy-making is to generate wider understanding and consensus among the MSs, a number of consecutive and consistent judgments on analogous GSs would send a clear message to all MSs, cementing the EU institutions’ policy. Preferably, any such clear-cut enforcement policies and specific enforcement decisions aimed at developing the single market would prompt the MSs to ‘see the light’ and submit to significant policy changes in order to address the controversial GSs issue at stake. Consequently, in accordance with recent studies, following the CJEU’s judicial policy-making in the area of GSs, national governments should have shifted to substantial and comprehensive policy change in relation to these protectionist measures. Given the significance of

²³ As cited in BLAUBERGER (2012) at p.111 studies by GENSCHEL, JACHTENFUCHS (2011) and MARTINSEN, VRANGBÆK (2008). *Also* MARTINSEN (2011).

compliance obligations imposed on MSs by Article 4(3) TEU and Article 260(1) TFEU, coupled with the Union's clear-cut position on the subject of GS protectionism, it seemed that these measures had no future in the EU.

However, the years of legal battles and one sovereign debt crisis later, the Commission still sees GS protectionism as a significant challenge to the single market – which is ‘less popular than ever, more needed than ever’ (Monti 2010). The fact that GSs still remain a challenge reveals that the CJEU's jurisprudence could have failed to trigger broader national reforms. This would be in line with the findings of an earlier study in which Conant argued that the condemning judgment does not guarantee compliance by itself (Conant 2002: 15) and that the MSs ‘could “contain” compliance by applying the [Court's] rulings only to the immediate court cases while neglecting their broader policy implications’ (ibid: 32). The MSs' desire to contain compliance could point to a *minimalist* compliance strategy which could be incomplete and allow for the possibility of creating further infringements. Therefore, minimalist compliance can easily get transformed into non-compliance which would make a GS an obstructionist measure of national protectionism. Hence, this study reflects on the questions raised by Conant: whether the CJEU can ensure compliance with unpopular judgments against the will of the MSs' and whether MSs choose to comply with immediate judgments while neglecting their broader policy implications (ibid)?

The Commission's assessment of MSs compliance with GS jurisprudence could be seen as twofold, since right from the start of the battle to break down protectionist GSs the Commission has reported on the overall positive compliance trend. For example, the Commission has reported that the Italian government implemented sufficient compliance measures in 2001 to address the first GSs judgment of 2000.²⁴ The infringement procedure was terminated, but, as this study will demonstrate, the very same GSs were retained post-judgment and in 2003 Italy faced infringement action for non-compliance under Article 260 TFEU. Over the years the Commission's assessments of compliance with GS-related judgments have pointed to a comprehensive compliance trend, reporting that MSs do comprehensively comply and, as a result of these judgments, many other GSs have

²⁴ Case C-58/99 *Italy, Commission v Italy* [2000] ECR I-03811.

been abolished.²⁵ For example, it has been claimed that Italian GSs, which were found incompatible with the Treaty in the first GS judgment mentioned above, were successfully amended prior to the judgment and following this amendment were in conformity with the Treaty.²⁶ However, the subsequent judgment of 2009²⁷ on the amended version of Italian GSs featured in the 2000 judgment clearly demonstrates that the initial and subsequent compliance attempts were inadequate, making the infringement stretch on for almost a decade. Similarly, in 2005 the report²⁸ prepared for the EU Commission provided that as a result of the CJEU's judgment²⁹ on Portuguese privatisation law C-367/98 (which allowed for creation of GSs), GSs in Portuguese companies were abolished. Nevertheless, this study reveals that the said judicial compliance instrument has not been effective in facilitating compliance and it is only following the application of the penalty instrument that the breach was finally remedied. The said judgment also could not preclude Portugal from resorting to the GS mechanism in the future, as the Court had to issue another three rulings on GS mechanisms which were based on the privatisation law.³⁰ In 2005, the Commission services assessed the work carried out on the abolition of GSs across MSs by asserting that it has 'cooperated successfully' achieving 'a good level of understanding' on the issue, particularly with new MSs.³¹ Regarding such positive outlook on compliance trend in new MSs, it should be emphasised that GSs implemented for the most important and major companies remain intact to this day. Also in 2005, the Commission commented on the diminishing role of GSs, revealing that as a result of the CJEU's judgments, overruled measures were repealed or significantly scaled down by the respective governments. However, the majority of infringement cases opened in 2006 still related to different kinds of GSs and, remarkably, the Commission reported on the increasing frequency of the implementation of GSs not only in the 'classic' area of strategic industries such as the energy sector, but also in companies operating in the financial sector.³² In a

²⁵ European Commission, SWD (2005), Special rights in privatised companies in the enlarged Union—a decade full of developments; OECD (2003), Privatizing State-owned Enterprises: An Overview of Policies and Practices in OECD Countries.

²⁶ OECD (2003), *op. cit.*, p.111.

²⁷ Case C-326/07 *Commission v Italy* [2009] ECR I-02291.

²⁸ OXERA Report (2005), *supra* note 20, p.38

²⁹ Case C-367/98 *Commission v Portugal* [2002] ECR I-4731.

³⁰ Case C-171/08 *Commission v Portugal* [2010], ECR I-0000; Case C-543/08 *Commission v Portugal* [2010] ECR I-0000, Case C-212/09 *Commission v Portugal* [2011] ECR I-0000.

³¹ European Commission, SWD (2005), *op. cit.*

³² European Commission, SEC(2007) 975, Statistical Annex to the 24th Annual Report – 2006, p.82.

similar vein, the Commission once again confirmed in 2007 that GSs represent a significant issue and the majority of infringement cases opened in that year related to GSs.³³ In 2007 the Commission also reported on the increasing number of new GSs implemented in the energy sector. In 2009 the Commission reported that it had closed many GS cases, yet 40% of all infringement cases handled in that period related to GSs.³⁴ In 2010 the Commission announced that ‘progress has been made in the sense that MSs concerned have announced or prepared legislative amendments which *could possibly* solve the outstanding issues’.³⁵ In line with the above statement, on 24 June 2010 the Commission closed³⁶ the infringement procedure against Italy in view of the amendment of the GSs overruled in the 2009 judgment mentioned above. This fact implies that the Italian government comprehensively complied by amending the overruled GSs. Despite the announcement that the infringement procedure on the matter was closed on 24 June 2010, the Commission issued a reasoned opinion on 16 February 2011 under the second round infringement procedure of Article 260 TFEU (European Commission IP/11/175). In 2010 almost half of the infringement cases on GSs were pending before the CJEU or became subject to Article 260 TFEU proceedings.³⁷ In 2011 the Commission once again reiterated that GSs remain a priority and a significant concern, particularly due to the protectionist measures implemented in the context of the financial crisis of 2007-2008.³⁸ In the same report in 2011, the Commission rather optimistically revealed its expectations that the GS issue would be *finally resolved* in 2011. However in the following years the CJEU handed down several other GS-related judgments³⁹ which imply that the issue remains unsolved.

At this point, it could be concluded that over the years the issue of GSs as barriers to capital movement has remained prominently on the Commission’s agenda,⁴⁰ which proves that GSs are still a significant problem despite the judgments of the CJEU. Some outlawed GSs have prominently remained on the Commission’s

³³ European Commission, SEC(2008) 2854, SWD, Situation in the Different Sectors, Accompanying document to the 25th Annual Report – 2007, p.182-3.

³⁴ SEC(2010) 1143 final, *supra* note 14, p.297.

³⁵ *Ibid.*

³⁶ European Commission, COM(2011) 588 final, 28th Annual Report – 2010, p.51; SEC(2011) 1093 final, European Commission, Situation in the Different Sectors, p.288.

³⁷ SEC(2010) 1143 final, *supra* note 14, p.298.

³⁸ SEC(2011) 1093 final, *op. cit.*, p.289.

³⁹ Case C-244/11 *Commission v Greece* [2012] judgment of 8/11/2012, not yet reported; Case C-95/12 *Germany*, note 18.

⁴⁰ COM(2013) 726, *supra* note 13, p.12; European Commission on Infringements (Free movement of Capital) available from: http://ec.europa.eu/internal_market/capital/infringements/index_en.htm

infringement agenda for years following the condemning judgments. In this light, the Commission's initial assessment of the MS's compliance has been rather optimistic,⁴¹ while successive infringements via amended provisions have proved that the initial compliance was inadequate. To this day, GSs are still widespread and new measures are being implemented,⁴² which raises the question of the effectiveness of the EU institutions' agenda-setting abilities. This study aims to demonstrate whether the Commission's positive assessment of post-judgment compliance was premature, since the very same GSs became subject to further enforcement action. Consequently, the Commission and some commentators (e.g. Benyon 2010: 113) could have undervalued the obstructionist force of the GSs. This supports the argument that even though 'GSs constitute only a small fraction of legal obstacles which stand in the way of the creation of the EU-wide single market' (Adolff 2002), they are truly significant and above all they are not 'tarnished gold' (Benyon 2010: 113) and the battle to overcome these significant barriers continues to this day.

Both the EU Commission and academic literature agree that non-compliance with EU law remains a concern (Tallberg 2000; Mastenbroek 2003; Panke 2010; Stone Sweet 2010). However, it should be noted that as little as 10% of all the cases ruled by the CJEU face the penalty procedure threats under Article 260 TFEU, but as this study will show this ratio is almost as high as 80% when it comes to GS-related judgements. It is a clear indication that GS-related judgements could trigger a very unique compliance behaviour, which has to be studied and evaluated on its own. In other words, the preliminary non-compliance pattern is evident (even if the trend is not wholly uniform) consequently, additional research is necessary to investigate factual compliance with significant policy-setting judgments, such as GSs.

This study reflects on the persistent conflict and current debate on the EU and the MSs' fundamentally different conceptions of the role of markets and the role of states in the public service sectors (e.g. Cremona (ed.) 2012; Schweitzer 2011). In doing so, it demonstrates whether the MSs are likely to meet the Court's decisions on GSs with strong scepticism in cases where national interests are juxtaposed with

⁴¹ European Commission, SWD (2005), supra note 25, p.13.

⁴² For example in 2008 Greece implemented GSs in *Hellenic Telecommunication Organisation*; see European Commission (IP/12/420). Also in 2008 Greece implemented GSs in 'strategic companies'; these GSs were later overruled by the CJEU in Case C-244/11 *Greece*, note 39.

the pressures of the single market. The findings of this study will echo the words of former EU Competition Commissioner Mario Monti, stating that ‘the MSs may be reluctant to comply with condemning judgments of the CJEU on matters which are deemed to be solely under their authority’ (Monti 2010). This study aims to establish whether the political commitments to respect the rulings of the highest legal authority of the Union could override the desire to protect national interests, or whether a wide gap exists between commitments and actual implementation, or else between the obligation to comply and actual compliance when the matter concerns GSs. As this study argues, due to the significance of the conflicting interests involved, the tension between national and supranational interests and values might persist post-judgment. This study aims to reveal whether the MSs’ attempts to continue using overruled GSs in EU-compatible ways could constitute an effective compliance strategy or whether such compliance tactics inevitably give rise to non-compliance and to the emergence of obstructionist protectionism. This study argues that the MSs could seek to further protect the stated public interest and limit or contain the effects of the GS rulings at national level. As a result, GS protectionism could remain in force despite condemning judgments, as MSs often resist full compliance or ‘regulatory surrender’ in several ways. First, GSs could be amended in a manner that retains the protectionist effect and thus a new dispute concerning the same provisions might arise in separate proceedings, which in turn reveals that MSs resorted to non-compliance with the original judgment. In this instance non-compliance could be seen as a form of sanctioning (Tallberg 2000). Secondly, MSs could fail to embark on a wider policy change by keeping similar GSs intact or using new GSs in place of the overruled ones. Such compliance techniques could actually be seen as factual non-compliance with GS jurisprudence which could lead to obstructionist protectionism.

The key thrust of the thesis is to discover the factual compliance situation for each GS-related judgment, revealing the effectiveness of the EU enforcement system when applied to sensitive subjects such as GSs. By engaging in careful process-tracing, this study reveals whether the MSs could be seen to be acting in bad faith towards the sincere cooperation obligation principle enshrined in Article 4(3) TEU and towards the compliance obligations under Article 260(1) TFEU, and whether they could have gravely disregarded the limits of their discretion by maintaining GSs despite condemning judgments. This study assesses the connection between the

various factors and casual mechanisms which could help to recognise the conditions that promote compliance and to explain non-compliance with GS judgments. It also demonstrates why non-compliance with GS rulings stands out from other instances of non-compliance and how the effectiveness of the enforcement system could be improved. The analysed information on compliance processes in various MSs allows an exhaustive picture to be drawn of the practical application of GS-related judgments at national level. The aim of this study is to stimulate academic debate on the role of the Commission and the CJEU, with a specific focus on the post-adjudicative phase and to draw attention to the non-compliance issue from the particular perspective of MSs' practice in the area of GSs.

To analyse post-judgment compliance with such a complex issue as GSs it is necessary to identify the possible reasons for obstructionist protectionism and non-compliance. To reveal the reasons, it is first necessary to put GS judgments and the subsequent compliance obligation in the context of the EU single market. The following section aims to do this by setting the background against which the present study is going to unfold. This relates to a very complex scenario that interlinks conflicting values and interests at European and national levels, which in turn have prompted MSs to implement GSs and subsequently could lead to non-compliance post-judgment. To illustrate the intricate issues which arise as a result of the conflicting values and interests, discussion on the aims of the Treaty will be contrasted to the obligation of the MSs to protect legitimate national interests and the subsequent compliance obligations undertaken by them. As a starting point, the following section reveals the predominantly neoliberal ideas behind the single market that aim to promote competition by diminishing the role of the state and increasing shareholder value. The idea behind the market will be contrasted to different traditions of state involvement in national economies. This discussion aims to reflect on the interplay between the current differences in the national economic traditions or varieties of capitalism (*e.g.* Crouch, Streeck 1997; Hall, Soskice 2001; Crouch 2005) and the ultimate 'ever closer' unity which compliance with the CJEU's judgments promotes.

3. The Complex Scenario: Shared Pursuit for Unity and Single Market v Diversity of National Interests and Values

From the onset the primary objective behind the EU's inception and the core justification for European integration has been a creation of single market (e.g. Schweiger 2014: 23; Leibfried 2010: 245) which has developed into 'the world's most advanced and sophisticated multi-national project of economic integration' (Howarth, Sadeh 2010). The EU has predominantly taken up the role of economic liberaliser, striving to free national markets by harmonisation of national laws, by promoting market incentive and by introducing competition into previously closed industries (such as energy production and distribution, telecoms, post and transport). To date the establishment of single market remains 'a key parameter for the overall successes' of the European project (Maletić 2013: 1).

One of the most important policies behind the single market is liberalisation of capital movements which aims to promote growth by fostering both intra- and extra-EU investment.⁴³ The logic behind the single market foresees that uniform, linear liberalisation of national markets and industries from state control and intervention would create a level-playing field which would have a direct impact on behaviour of companies as they would have to become more shareholder-oriented and operate in a profit-seeking way, which in turn will increase competitiveness, reduce prices and increase choice for consumers (Clifton *et al* 2010: 991; Haar, Jones 2008: 2610).⁴⁴ The single market logic assumes that the MSs, as voluntary signatories to the Treaties, would have a stronger incentive for market liberalisation than for national protectionism. Following a single market logic restricting capital inflows or outflows is simply counterproductive, as this would deter potential capital injections into a country's economy (inbound movement) while also inhibiting domestic companies' ability to invest capital in new territories and to establish themselves in new markets (outbound movement).

The MSs have committed to progressive integration and liberalisation of national markets in order to build an 'ever closer union among the peoples of Europe' to ensure the economic and social progress by elimination of barriers to

⁴³ E.g. European Commission, SWD (2013) 146 final, Free movement of capital in the EU, p.14.

⁴⁴ The conditioning force of the M&As has been first described by MANNE in 1965 in his seminal work 'Mergers and the Market for Corporate Control' suggesting that if a company is poorly managed, it could become a lucrative takeover target 'to those believe that they can manage the company more efficiently' and 'the market for corporate control could magnify the efficacy of corporate governance rules, and facilitate greater accountability of directors to their investors'.

fundamental freedoms that stand on the way of single market. The obligation of compliance derives from the legally binding duty enshrined in Article 4(3) TEU, which signifies that the very essence of the Union's success rests on the MSs' sincere willingness to respect the supremacy of the EU *acquis communautaire*, to cooperate and comply in good faith in order to achieve shared interest and values that would bring more liberalisation and unity. In this light, purposeful imposition of unjustified barriers that limit capital movement 'could bring market integration to a standstill undermining the core aim behind the EU (Clifton *et al* 2010: 989).

According to many financial economists, a truly single EU-wide market could be characterised by free movement of capital and establishment which would promote competitiveness through M&As by introducing the 'survival of the fittest' idea that stimulates companies to operate more efficiently. This liberal, market-oriented idea is supported by a strand in the theoretical economics literature which sees cross-border M&As as an important and desirable element (*e.g.* Jensen 1988; Scharfstein 1988; Brealey, Myers 1991: 823; Gill 1995; Grabowski *et al* 1995; Haar, Jones 2008; Bernitz 2010: 192; Schweiger 2014: 23). This strand of literature accepts that the market for corporate control represents an important corporate governance device, since, if a company is badly managed and performs poorly, it is more likely to fail or become subject to a disciplinary takeover (*e.g.* Bethel *et al* 1998; Denis, Sarin 1999; Lambrecht, Myers 2007; Segall 1968; Kini *et al* 2004). Some empirical evidence suggests that the conditioning effects of a takeover may correct failure as a result of poor corporate governance (Shleifer, Vishny 1997; Heiss, Köke 2004; Powell 1997).⁴⁵ However, one-dimensional thinking about M&As as a means of disciplining underachievers and as a means of promoting development and generating growth is too simplistic.

Despite the perception that a truly free market would benefit European citizens and companies, the mechanisms of a market economy and regulatory competition cannot be taken for granted, as 'markets do not necessarily generate superior outcomes' (Hall, Soskice 2001: 65; *also* Crouch 2005: 6; Hopt 2010: 18). The second strand of literature suggests that M&As are not related to poor performance (*e.g.* Franks, Mayer 2001) and could also destroy value and undermine growth, while also causing loss in employment (Sandford *et al* 1980; Turok, Richardson 1991). On balance, the argument here goes against the disciplinary motives behind

⁴⁵ M&As could be motivated by different rationales.

M&As, demonstrating that in the majority of cases target companies were not underperforming (*e.g.* Agrawal and Jaffe 2003). For example, a company could become the target of a takeover not because it is badly managed and performs poorly, but because the stock market has erred in setting share prices so low that an undervalued company becomes a lucrative takeover target (Scherer 1988: 72). Similarly, stock market valuation errors could overvalue some companies, allowing them to gain control of a company that is undervalued (*ibid.*).

Consequently, M&As are not necessarily welfare enhancing and it has long been accepted that unrestricted capital movements and the non-discriminatory treatment of domestic and foreign companies raise a number of substantial problems (Charny 1991; Chen *et al* 2002; Contractor *et al* 2003; Haar, Jones 2008; Mitchell *et al* 1994). The adverse effects of unchecked market-driven values and global convergence in corporate governance on society have been voiced, for example by Branson (2001). Branson argues that the irrelevance and impotence of the state in the economy could lead to an increase in economic imperialism, worker exploitation, degradation of the environment, and the possibility of the related ‘plantation production’ problem (Branson 2001: 71). Likewise, the pure market could also be associated with short-termism rather than long-term enhancement, so it has been claimed that the market cannot by itself sustain economic dynamism (Gill 1995; Crouch, Streeck 1997). Consequently, a number of authors emphasise the importance of state intervention in modern capitalist economies (Schweiger 2014). As Schweiger rightfully notes, MSs are responsible ‘for the overall well-being of their citizens’ and governments have to look beyond pure market interests (*ibid.*: 9). This particularly applies to industries that provide services in the general interest, as the state has a crucial role to play as a provider and guarantor of the secure and continuous delivery of such services (*ibid.*: 12). The important role of the state in the regulation of national economies has been strengthened by serious problems into which the single market has run as a result of the severe sovereign debt crisis. The crisis has revealed ‘[t]he limits to what the market can deliver’, also revealing that ‘the single market is not yet [...] rooted in mindsets’ (Monti 2010: 23).

Following the above delineation of the positions taken by both pro- and contra-market camps, it is necessary to re-emphasise that this study is not about cross-border M&As and their costs or benefits. Opinions are divided on whether M&As are effective for welfare enhancement, and in reality only time will tell if a

particular transaction has been an overall success or not, if it has created value or is liable to destroy welfare. Consequently, an in-depth discussion of the arguments on each side is outside the scope of this study. The author does not lean towards any of the camps and approaches the subject from a legal perspective and not an economic one. At the same time, solely from the legal perspective, the author acknowledges that an illegitimate barrier to M&As is undesirable (especially if the illegitimacy has been confirmed by the CJEU). It is also worth mentioning that out of sixteen judgments (where the CJEU has assessed the legality of GS measures) only seven cases have actually involved M&A-related activities.⁴⁶

The situation is further complicated by the fact that in the EU MSs operate under different national economic traditions: they follow different models of corporate governance and have different traditions of state involvement in their national economy. These differences show that for some MSs the liberalisation of capital movement and the embracing of shareholder value would be significantly easier to achieve than for others. For the purpose of this study, a distinction will be made between MSs with co-ordinated (or continental) market economies and MSs with liberal (or Anglo-Saxon) market economies. The economies of the latter MSs, as the name suggests, are traditionally more liberal towards the free movement of capital, accepting market-driven changes in the economy and favouring an open market and a vigorous competition policy (the UK). The approach of liberal MSs welcomes less state intervention in the economy and less stakeholder protection, with consumer welfare and shareholder value placed at the front and in the centre. In contrast, under the co-ordinated model of capitalism (such as that in Germany, the Netherlands and France) greater attention is paid to social concerns so that societal or stakeholder pressures could limit the rights of shareholders and influence managerial decision-making (Charny 1991: 439). Under the co-ordinated model, consumer and shareholder interests are co-ordinated with the interests of other stakeholders, such as employees, while ‘the enforcement of single market rules has not always been welcomed’ (Monti 2010: 28). This diversity in national models of capitalism, economies and industrial relations has determined the level of exposure to the mechanisms of a single market and of liberalisation (Burroni *et al* 2012: 3).

⁴⁶ Namely in Italian cases: C-58/99, note 24 and C-174/04, note 19. Spanish cases: C-274/06 *Commission v Spain* [2008] ECR I-00026; C-207/07 *Commission v Spain* [2008] ECR I-111 and C-196/07 note 17. German case C-112/05 *Commission v Germany* [2007] ECR I-8995 (‘Volkswagen’ case) and Portuguese cases C-367/98, note 29 and C-171/08, note 30.

However, in both liberal and co-ordinated models of capitalism, the liberalisation of public service industries (such as energy, national airlines, telecommunications, transports and utilities) has been a sensitive topic, as these industries are usually under state monopoly and involve political and industrial issues that hardly concern other competitive industries (Boubakri *et al* 2009: 367; Burkart, Lee 2008: 38; Cocciolo, Padrós 2010). When the companies operating in public services are owned by the state, governments inevitably pursue wider industrial, social and political interests in accordance with domestic policies, and they were clearly expected to do so by the public (Hansen 2010: 177; Colli *et al* 2014: 489; Burkart, Lee 2008: 38; Shleifer, Vishny 1994: 995). There has been persistent public hostility and political opposition to privatization and liberalisation of public service industries (Howarth, Sadeh 2010: 927). Firstly, it has been perceived that public services could and should only be provided by state-owned enterprises (SOEs) and that there is no place for privatisation or liberalisation in these markets (*ibid*; Szyszczak 2007: 42). Government control of these companies was often associated with increased security that ensured economic growth, low unemployment rates and an improvement in labour welfare. Secondly, in contrast to the state-induced obligation to protect public interests, markets contain no inherently dominant and stable long-term economic interest to safeguard the same interests. Put simply, SOEs were often seen as curing market failures (*but* Shleifer, Vishny 1994: 995), so from this perspective liberal ideas behind the single market could be seen as an undesirable real or perceived threat for industries that provide services in the general public interest. It could be concluded that the supranational undertaking to liberalise national markets and capital movement is not the only relevant value and interest the MSs are obliged to protect. Besides, there are a number of significant concerns surrounding the single market.

However, despite the importance of state control over public service industries, the MSs voluntarily choose to sell their shares and privatise SOEs. This fact could signify that national governments could be seen to be voluntarily pursuing economic policies which bring ‘more market’ and shareholder value into their public service industries. Such economic policies might be seen to be pursuing the shared values and interests of the EU and the single market. Unfortunately this has not been the case, as ‘more market’ has not meant a ‘free market’: the MSs choose to protect strategic national interests and values from the shared interest and values of the EU

single market by violating the guarantees provided by the latter. The MSs implemented GSs to preserve their role as ‘guardians of citizens’ against the dangers of a ‘pure’ market on the expense of the free movement of capital. From the one point GSs which were created at the beginning of the privatisation process in order to provide a shield against hostile takeovers and to give the newly privatised companies some ‘breathing time’ (Clifton 2010: 999) to adjust to the market could be seen as a useful tool. It is certainly reasonable to protect companies that are of vital importance, as long as their competitiveness is not fully restored and regulation is weak (Bortolotti, Siniscalco 2004: 97). From this perspective, given the weight and number of interests and values involved, the MS would be reluctant to allow a company providing public services to become the subject of a hostile takeover, undesirable restructuring, considerable disposal of its assets, workforce or even bankruptcy. Therefore, in order to protect national interests and to address the EU’s pressures to liberalise, governments have sought to implement GSs as a form of a state ‘guarantee’ (Biondi 2010: 102). However, even though the MSs could have legitimate reasons in protecting their public policy or public security by means of GSs, these barriers to capital movement must be legally certain, reasonable and proportionate to the objectives pursued.

Shortly put, GSs represent *national protectionism* in action, allowing the state, and not the shareholders or the free market to control the company, effectively shielding former SOEs from the full force of single market. Basically, GSs were the result of an unfair deal which allowed respective MSs to obtain revenues from selling SOEs without full disposal of control which such an asset disposal would normally assume. In this regard, the idea behind GSs corresponds to the legal maxim that ‘he who can do most can also do least’,⁴⁷ so that a government could legally decide to sell its companies without relinquishing corresponding control. However, given that the same protectionist objectives could be achieved by the simple decision to retain a blocking minority stake of 25%, which would not encroach on the fundamental freedoms of the Treaty, GSs could be seen as ‘little more than an alibi’ for raising unjustified protectionist barriers (Bortolotti, Siniscalco 2004: 88). Given the availability of the said alternative, the challenge of GSs is not so much the desire and necessity to find the right balance between supranational and national interests, but, in the words of Rickford (2010: 54), rather just an ‘assertion of selfish interests

⁴⁷ Case C-463/00 *Spain*, note 19, para.41.

in defiance of market forces’ which aims to ‘insulate national markets from foreign competition, mainly in markets for capital and corporate control (often dressed up as social policy)’. Likewise, the numerous examples of takeovers which took place immediately following the privatisation of former SOEs demonstrate that the provision of public services in the general public interest has not been undermined by hostile takeovers, as water and gas have kept flowing, trains have continued to run, and no one has cut the electricity supply to the homes of citizens. The GS-related jurisprudence has been successful in demonstrating that GSs are not suitable for protecting the stated national interests.

After it confirmed that the MSs’ interventions into the operation of national industries by means of GSs are unlikely to be justified, the CJEU has been seen to be encroaching on the policy-making capacity of the MSs and their powers to regulate the economy. These powers were thought to be under the exclusive responsibility of the domestic authorities and now, following the GS rulings, these powers have been proven to be subject to the Treaty freedoms, shifting from the national towards the supranational level (*e.g.* Goldmann 2001; Sørensen 2004; Herschinger *et al* 2011; Martinsen 2011; Stone Sweet 2004). Consequently, more and more GS arrangements have been found to constitute unjustified barriers to free movement. The dominant neoliberal vision of the ‘ever closer’ maxim has inevitably triggered a further clash of interests at European and national levels. This clash of interests could have different levels of severity, since MS laws, practices and traditions differ. Likewise, in some MSs, governments and the public could show greater acceptance of and support for the single market and relevant policies since the EU and national rules and practices are more compatible than in other MSs where such a ‘fit’ is significantly lower. Put simply, the more a GS-related judgment by the CJEU already ‘fits’ the current legal, societal and industrial framework, the more likely it is that the MS will comprehensively comply (Börzel 2002; Panke 2010). Therefore, it could be argued that for some MSs the adjustment pressures stemming from the market-promoting GS judgments would be higher than for others. In this respect, the GS case-law could be seen to be exerting significant pressure on the co-ordinated model of a market economy, pushing it further towards a more market-oriented liberal model. Therefore, the prospect of the increasing irrelevance of the national state in light of a GS-related judgment could be seen as “an attack on the states’ system of corporate governance and national sovereignty”

in MSs with a co-ordinated model of capitalism (Saam, Zumbansen 2007: 1044). In contrast, the liberal model of a market economy ‘fits’ the overarching supranational aims of capital market integration. Consequently, MSs characterised by the former model of a market economy could be expected to exert more resistance to compliance post-judgment than MSs characterised by the latter model.

Essentially, as the EU is sustained by the MSs’ respect for the rule of law and due compliance, the liberal aims of the single market and the CJEU’s interpretation of the Treaties which has deepened integration and liberalisation could trigger non-compliance post-judgment. Since MSs are giving ‘flesh and blood’ (Vervaele 1999: v) to the smooth operation of the single market, non-compliance with judgments of the CJEU aimed at the enforcement of the core single market principles could be seen as one of the most serious forms of non-compliance. Non-compliance with judgments on GS cases could be seen as particularly significant since the protectionist aims of these barriers could be effectively achieved by other legitimate means – for example by re-nationalising the blocking minority stake in the company that the MS wishes to protect. Failure to comply with GSs judgments would signify that the defending MSs are acting in bad faith towards obligations enshrined in the Treaty. To understand and predict non-compliance in relation to GS judgments, it is first necessary to understand how GS protectionism operates and to further comment on the reasons why they represent such a significant hindrance to cross-border investments and takeovers.

4. GSs as Control Enhancing Mechanisms and their Justifications

The ordinary or common share represents part ownership of a company and carries one voting right per share, which assumes proportionality or the ‘one share-one vote’ (OSOV) principle at its core. According to this principle, there should be a correlation between shareholders’ degree of economic risk/reward and the degree of control that they exercise over the company (Manne 1965). Even though the MSs generally accept the said principle by default (*e.g.* Ringe 2010: 222) and some have even formally adopted it to some extent,⁴⁸ it is not mandatory. This implies that the proportionality principle does not impair the freedom of contracting, allowing shareholders to organise the company as they desire and separate ownership rights from control rights by implementing different types⁴⁹ of shares (*e.g.* shares with multiple voting or special rights). Under general company law, such disproportionate shares or Control Enhancing Mechanisms (CEMs) are a recognised tool that shareholders are free (*e.g.* Bebchuk 1989: 1826) to use even if they are clearly intended to restrict cross-border investments and takeovers.⁵⁰ GSs aim to separate property rights from control rights and they represent one of the most powerful and effective CEMs.

Typical GSs could have the following structure: where direct influence was lost due to privatisation,⁵¹ *special rights* (such as the right to veto the usage and disposal of strategic assets and the right to appoint directors) were attached to a special GS and were generally created for the sole benefit of the state. Special rights were introduced by inserting special elements into companies’ statutes,⁵² or by adopting legislation that privatised a particular company,⁵³ or by legislation that

⁴⁸ *E.g.* the UK, Belgium, Germany, Greece, Spain, Luxembourg.

⁴⁹ *See e.g.*, Report of High Level Group of Company Law Experts on Issues Related to Takeover Bids (2002); Report on the Proportionality Principle in the European Union (2007).

⁵⁰ According to the CJEU’s preliminary ruling on Case C-281/98 *Roman Angonese and Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139, para.36, the prohibition of discrimination on grounds of nationality also applies to private persons, which implies that private shareholders must conform to provisions on free movement and discriminatory barriers to free movements are not allowed; *see e.g.* RINGE (2011: 476). For the economic significance of deviations from proportionality principle *see* ADAMS; FERREIRA (2008); on cons, pros and the desirability of the OSOV principle *see* BURKART and LEE (2008).

⁵¹ When majority of the shares were sold to investors and only a non-controlling stake was retained.

⁵² As in Case C-483/99 *Commission v France* [2002] ECR I-4781, para.44; Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641; Joined cases C-282/04 and C-283/04 *Commission v Netherlands*, note 10; *Federconsumatori*, note 16.

⁵³ Case C-58/99 *Italy*, note 24; Case C-463/00 *Spain*, note 19; Case C-503/99 *Commission v Belgium* [2002] ECR I-4809; Case C-367/98 *Portugal*, note 29.

applied exclusively to companies operating in certain markets,⁵⁴ or by some hybrid arrangement.⁵⁵

The availability of GSs and other CEMs may lead to a situation where an investor who has acquired a majority of shares will not be able to exercise full control over the company, inhibiting on his rights of a majority shareholder. In order to facilitate takeover activity a ‘revolutionary’ (Hopt 2010: 20) break-through rule has been incorporated into Article 11 of the EU Takeover Directive: in cases when a bidder acquires 75% of the target company’s shares, deviations from the OSOV principle should be suspended so that the bidder will be able ‘to break-through’ defensive CEMs and assume full control over the target company. However the ‘break-through’ rule would not apply in situations where the MS has *legitimate special rights* in the target company. Such an exception from ‘break-through’ rule refers to the possibility of resorting to GSs only if such GSs are compatible with the Treaty.

The CJEU held that GSs could only be applied for the protection of non-economic interests⁵⁶ and they must be subject to effective judicial review. Even though the protection of general financial interests cannot justify GSs, in the recent ruling on *Servatius*⁵⁷ case the CJEU declared that a macro-economic reasons could be considered and restriction on free movement of capital could be justified if there is a risk of ‘seriously undermining the financial balance of social policies’. However, the CJEU confirmed its settled case-law,⁵⁸ maintaining that in order for such Treaty *exceptions* to have a legitimate standing, they have to meet *exceptionally* limited criteria and pass the legal certainty and proportionality test. In a nutshell, GSs could be justified only when the four-fold proportionality criterion set out in *Gebhard*⁵⁹ is met:

‘national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing

⁵⁴ Case C-174/04 *Italy*, note 19; Case C-274/06 *Spain*, note 46.

⁵⁵ *Volkswagen* case, note 46.

⁵⁶ Case C-36/75 *Rutili* [1975] ECR I-1219 para.30; Case C-367/98 *Portugal*, note 29, para.52.

⁵⁷ Case C-567/07, *Sint Servatius* [2009] ECR I-9021.

⁵⁸ CJEU’s cases: Case C-19/92 *Kraus v Land Baden-Wuerttemberg* [1993] ECR I-1663, para.32, Case C-55/94 *Gebhard* [1995] ECR I-4165, para.37; Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera* [1995] ECR I-4821 paras.41–47; Joined Cases C-358/93 and C-416/93 *Bordessa* [1995] ECR I-00361, para.33; Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, para.17; Case C-72/83 *Campus Oil and Others* [1984] ECR 2727, para.34.

⁵⁹ *Gebhard*, *op. cit.*, para.37.

the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.'

On signing the Treaty the MSs agreed on the Treaty's neutrality as regarding to public versus private ownership of companies: pursuant to Article 345 TFEU the 'Treaty shall in *no way* prejudice the rules in MSs governing the system of property ownership'. This could imply that MSs are free to create new systems of property ownership differentiating from solely private or public ownership systems. However, the CJEU has maintained that MSs could not plead their own systems of property ownership referred to in Article 345 TFEU, by way of justification for obstacles to fundamental freedoms, such as GSs.⁶⁰ The CJEU established that the shareholder-state could not opt out from provisions of company law in the same way as private shareholder can: in cases when the state holds the special rights, they must be used in accordance with the principles of public law and not in accordance with private company law simply because the MS is a signatory to the Treaty.⁶¹ This is a crucial point which means that if a state acts as a market participant it cannot intervene by opting out of the rules of company law in the same way as a private shareholder can, implying that when the state is a shareholder it has to adhere to the OSOV principle (*e.g.* Shleifer 1998). As a result, private shareholders are generally free to legally implement and use special rights that deviate from the OSOV principle and resemble GSs. MSs are not free to resort to this method unless GSs are duly justified.

The CJEU's judicial creativity interpreting such politically sensitive issues as rules on national property ownership, coupled with integrationist approach to interpretation of what constitutes barriers could be met with strong opposition from the MSs and result in non-compliance post-judgment. Such resistance to full 'regulatory surrender' could be explained by the MSs' disapproval of the EU's agenda-setting policy and the CJEU's interpretative case-law in relation to GSs. The CJEU's unwillingness to accept Article 345 TFEU as basis for GSs' legality could be seen as precluding the MSs from resorting to measures on which they have expressly agreed. Consequently, the MSs could resist compliance in trying to limit creativity of the CJEU by resorting to sanctioning through non-compliance.

This study argues that non-compliance with Treaty provisions by implementation of GSs is often a result of deliberate policy choices by the MS to

⁶⁰ Case C-367/98 *Portugal*, note 29, para.48; Case C-483/99 *France*, note 52, para.44.

⁶¹ Case C-98/01 *United Kingdom*, note 52, para.51.

maintain the ‘untouchable status’ of the company at issue. Therefore, the MSs could be inclined to contain the effects of GSs judgments. At this point, it is necessary to comment on the *possible outcomes of compliance strategies* employed by the MSs in relation to GS cases. First, the CJEU’s judgment on the GSs would not make all of these measures inapplicable, for which there are several reasons. Since GSs could have a legitimate standing, the Commission has to assess the legality of such measures on a case-by-case basis, initiating direct enforcement of the Treaty rules. In this respect, a harmonised approach to GS cases is unsuitable. As a result, every case on GSs leads to infringement proceedings concerning very specific provisions and their application. Given that the Court has so far found one case of GSs to be justified, it is clear that one cannot say that all GSs are illegal – it depends on the circumstances of each particular case. Also regarding compliance with the rulings, the Court has consistently held that *‘the incompatibility of national legislation with [...] [EU’s] provisions, even provisions which are directly applicable, can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended.’*⁶² This implies that overruled GSs could only be validated by adequate national law that would amend or repeal them.

Secondly, since the CJEU established that some GSs could have a legitimate reasoning but lack on legal certainty or proportionality, the MSs might be tempted to try and pass the legal certainty and proportionality test following the judgment. Theoretically, in this case, the way in which the law is applied could be amended, potentially making a GS, even an overruled one, a justified measure. However, here it is pertinent to emphasise that the erring MS is given sufficient time to comply on its own initiative at the pre-judicial stage of the infringement procedure under Article 258 TFEU. Consequently, since the MSs generally strive to avoid referral to the CJEU, they would choose to comply in good faith and adjust national laws so they would satisfy the general principles of proportionality and certainty if at all possible. However, legal certainty and proportionality test is very difficult to pass otherwise the MSs would have long amended their GSs without the necessity to enter the legislative battle with the EU Commission. Therefore there could be two outcomes of the compliance ‘by amendment’ strategy: one that is effective in facilitating post-judgment compliance and another that is insufficient. Following the

⁶² Case C-367/98 *Portugal*, note 29, p.41.

amendment, the GSs would either: (a) provide for significantly less protection as proportionality and legal certainty increases, or (b) they would retain the same amount of protectionist powers while significantly improving legal certainty. The former compliance ‘by amendment’ strategy could be potentially acceptable for effective post-judgment compliance. However, such strategy is undesirable for the MSs as they seek to retain the effective protection which equals to the level of the blocking minority shareholder, hence any protection that is less powerful would generally fail to guarantee the stated aims of public policy protection. The latter compliance ‘by amendment’ strategy is unacceptable for guaranteeing the effective compliance with the judgment, since the same amount of the protectionist powers would generally go beyond to what is necessary for the attainment of the objectives pursued. As a result, if the GSs have not been amended prior to the judicial stage of the infringement proceedings this could generally imply that the contested measures cannot be adequately adjusted, so they have to be repealed in their entirety. If, following the judgment, MSs attempt to comply by amending GSs it could lead to insufficient, or minimalist adjustments that are likely to be insufficient to eliminate unjustified impediment to capital movement. Hence, compliance ‘by amendment’ strategy is unlikely to facilitate effective compliance with GS judgments (otherwise the breach would be remedied before the judgment).

It is pertinent to emphasise that compliance could easily be achieved by re-nationalization of a blocking minority stake, which under the EU law and general company law would allow for effective protection of the stated public policy considerations and other national and societal values. Given the availability of the alternative solution for satisfying both obligations stemming from the EU law and national interests non-compliance with judicially approved infringement in GSs cases is a grave misconduct that could be seen as crossing the red line. Unwillingness to completely remove GSs following the condemning judgments could mean that for some MSs violation of the EU law is not as important and significant, as the decision to re-purchase the 25% of the strategically important company stakes.

5. The Puzzle and Current Studies

The majority of hard non-compliance cases referred to the CJEU under Articles 258/260 TFEU relate to late or incorrect transposition and application of secondary law, while infringements for direct violation of fundamental freedoms, in particular the free movement of capital, are relatively rare.⁶³ Similarly, it could be assumed that MSs generally conform to the Treaty provisions on capital movement so there should be only few hard non-compliance cases that end up at the CJEU and consequently non-compliance with judgments aimed at enforcement of this core single market freedom should not be of particular concern or prominence. In order to support the argument on the suggested significance of the non-compliance situation in relation to GSs, it is necessary to make a distinction between overall non-compliance trends and non-compliance with the GSs jurisprudence.

It is necessary to emphasise that non-compliance with GS-related judgments must be assessed in relation to the significance of the post-judgment compliance obligations imposed on erring MSs pursuant to Article 260(1) TFEU when coupled with the frequency of second referrals under Article 260 TFEU. Here, it suffices to emphasise that as few as 10% of all the cases ruled on by the CJEU face penalty procedure threats under Article 260 TFEU (*e.g.* Panke 2010). Over the years, around 90% of all cases referred to the CJEU under the second round proceedings concerned non-compliance with judgments on late/incorrect implementation or application of the EU directives on environmental or social affairs, while cases for direct violation of fundamental freedom of capital movement through the maintenance of unjustified national barriers are exceptionally rare. This fact is significant since it reveals that the Commission has hardly ever used this enforcement weapon to bend disobedient MSs to comply with judgments on free movement of capital and remove the imposed barriers. However, a striking majority of judgments on barriers to capital movement that *do* proceed to second round penalty procedure relate to GSs.

This leads to the fact supporting the argument on the suggested significance of the non-compliance situation with GS-related judgments: out of a total of *fifteen condemning judgments* on GSs issued pursuant to the general infringement proceedings under Article 258 TFEU, in *twelve* cases the Commission resorted to

⁶³ European Commission Annual Reports on Monitoring the Application of Community Law, available from EUROPA site.

penalty threats under a second round infringement proceedings of Article 260 TFEU. Given that the complimentary enforcement action is only applied in cases of severe non-compliance which constitute about one-tenth of all CJEU judgments, non-compliance with GS rulings stands out as one of the most obstructionist cases of non-compliance. Therefore, when compared to other judgments on capital movement, GS case-law accounts for the largest percentage of infringement actions under the penalty procedure. The above facts suggest that despite the Union's success in overturning GSs, there is a significant deficit in compliance with CJEU's judgments nonetheless.

Much of the current academic research is concentrated on the effectiveness of a combined compliance approach (management and enforcement) used by the European system (Börzel *et al* 2010; Tallberg 2002). Here, enforcement assumes that MSs violate law voluntarily, because they are not willing to bear the costs of compliance, while the management approach accepts that MSs 'are generally willing to comply with the law of the [...] [EU] but lack the capacity' (Börzel 2003: 199; *but* Börzel 2001: 804), suggesting that the lack of the Member States' compliance with the EU law was not attributed to the lack of willingness or capacity to comply.

The procedure of Article 258 TFEU, which stretches on for many months, leaves the MS with a number of opportunities to comply. However, this study will demonstrate whether a MS could successfully stretch the infringement procedure and play the enforcement system when it is determined to delay compliance. As a result, even when the GSs are outlawed they may still remain in place, resulting in obstructionist protectionism that is in direct violation of sincere cooperation obligation.

The lengthy compliance bargaining during the infringement procedure is favourable for the MS in several aspects. Firstly, the GSs continue to serve their protectionist purpose, effectively shielding strategic companies from *cross-border takeovers*. Some of the GS cases have had significant implications for major cross-border deals which were pending at the time of infringement procedures. Here it is pertinent to emphasise that in cases where the infringement procedure of Article 258 TFEU seeks to overturn protectionist barriers which directly impede particular takeovers, the procedure is unacceptably long. A potential takeover is a very time-sensitive issue, so protectionist GSs implemented to thwart particular takeovers could effectively frustrate them, and thus the infringement action would be seen to

be acting too late to be effective. This study demonstrates whether the enforcement system of Articles 258 and 260 TFEU are ill-suited to accommodate the issue of GSs, particularly when the matter concerns a pending cross-border deal. Specifically, this study predicts a *higher degree of non-compliance when an undesirable takeover is a real threat*, so the MS's government would obstinately resist compliance with a condemning judgment and could willingly choose to proceed to the second round of infringement procedure and face penalty threats only to ensure that the undesired takeover collapses. No corporate action would survive such long-lasting processes, which aids the GSs in serving their purpose.

In a similar vein, the *application* of contested GS measures by the national authorities in order to block a *pending cross-border deal*, despite the Commission's expressed or implied warnings, would suggest that the respective MS would most likely resort to non-compliance following the judgment. Such disregard of both the Commission's warnings and the ongoing enforcement action would signify explicit bad faith of the MS. Also, as predicted by the hypotheses developed in this study, if the MS *implements similar measures to substitute* those that are subject to the infringement proceedings it will be seen to be acting in an obstructionist manner and in explicit bad faith towards compliance obligations. Here, it should be emphasised that in cases where the MS employs existing (not yet overruled) GSs in order to frustrate a cross-border deal, such conduct would be seen as a grave infringement. However, in cases where the MS chooses to implement and employ new GSs in order to substitute those already under the Commission's scrutiny, such conduct would be seen to be even more dire. The fact of implementation of new GSs or the use of existing measures to block a cross-border takeover deal would clearly demonstrate that the respective MS obtained a financial/competitive advantage from the breach, which is a sign of a very severe disregard of compliance obligations and disrespect of the core EU principles and aims. Such a state of play could prompt the Commission into proactive action, as there could be complaints from the involved companies because the measures in question hinder the particular cross-border deal. It would confirm that complaints about GSs (from citizens, companies or organizations) are more likely to be initiated by companies or investors that are interested in pursuing an acquisition of a company that is protected by such provisions. Supporting this statement, Sjafjell (2009: 6) rightfully notes that '*nothing in the business world brings latent conflicts of interest to a head and reveals*

structural, systemic, cultural and political variations between jurisdictions like a cross-border takeover attempt'. It follows that a potential takeover or a merger could be seen as a trigger for accelerating tensions and dissatisfactions within the company that is controlled by the MS through GSs, as shareholders of the target company could be economically attracted to such corporate action (incoming capital). Complaints on GSs, either from the target company itself or from potential investors, would prompt the Commission to pro-actively address the issue by employing the general enforcement instrument of Article 258 TFEU.

Secondly, the lengthy procedure of Article 258 TFEU is favourable for the MS since it is left to choose whether to comply at its own initiative or to postpone compliance until the binding judgment. Ideally, post-judgment, the tables are turned, as after the infringement has been confirmed the Commission will have gained an advantage in the sense that the MSs are now condemned and bound to comply sooner or later (Tallberg, Jönsson 2001: 16). However, this study demonstrates that when GSs are at stake, the advantage of the MS over the Commission could persist. Moreover, during the proceedings, the MS has sufficient time to investigate the compliance issue and find ways to recast its laws in a manner that would lead only to minimalist compliance. This situation could be established in cases where the application of GSs is proven to be illegal, yet the enabling law itself does not infringe the Treaty. In this instance, the national government would be left with a wide discretion on how to change its GSs, and they could be changed in a manner that avoids full compliance, so the MS shifts to *minimalist compliance* which could eventually lead to obstructionist non-compliance. The MS would not fail to take immediate action if it duly initiated the re-drafting of the national law; on the other hand, this legislative action could involve unnecessary procrastination. In cases where the action has been initiated but the progress is unsatisfactory or the legislative outcome of this action is insufficient and continues to employ GSs, the MS might be seen to be acting in bad faith towards the Treaty. The MSs' governments seem rather willing to test the strict justification criteria and eventually alter the GSs, expecting that the amendments will pass the subsequent justification tests. Furthermore, enforcement mechanisms would not appear to be sufficiently credible to deter the strategic behaviour of disobedient MSs, in cases where the government retains similar GSs, not yet overruled by the CJEU.

Time could also be a decisive factor in evaluating whether the MS has cooperated in good faith in trying to resolve the infringement. It could be argued that the *initial unwillingness to cooperate* or the shift to comprehensive compliance could be detected during all three stages of the infringement procedure. This study employs ‘compliance as process’ perspective (Panke 2010: 849), assessing the behaviour of MSs during the entirety of the infringement procedure, analysing any implied or expressed inclination to sincerely cooperate and comply in good faith. The MS’s behaviour, such as statements, compliance initiatives or non-action at the pre-judicial stage, at the hearing and at post-judgement stage, will be assessed. In this regard, it could be hypothesised that in cases where the MS replies with delay or altogether fails to reply to the Commission’s official ‘warnings’ (formal letter and reasoned opinion), it could be assumed that the MS moves towards non-compliance. In a similar vein, if the MS challenges the Commission’s application merely on its incompleteness or pleads its inadmissibility on vague or unsubstantiated grounds, it would point towards a desire to resist compliance and protect GSs by any means possible. Such conduct would imply that the MS resists cooperation in good faith, acting contrary to the obligations imposed by the Treaty. Additionally, if during the judicial stage of the infringement proceedings the MSs continuously argue at cross purposes with the Commission, never reaching an agreement on the legality of the GSs, this could imply that the relevant government was heading towards non-compliance. Yet we have found only limited support for the above predictions, since in some cases MSs have engaged in expressly ‘co-operative’ discourse at all stages of the infringement procedure, while still failing to comply in good faith. However, in some cases the MS has continuously failed to reply to correspondence, yet has consequently shifted into comprehensive (yet delayed) compliance.

The management approach which is occupied with improving the capacity of the MSs to comply is seen to be ineffective when dealing with GSs because non-compliance in this instance is deemed voluntary, and there is no genuine willingness to comply by fully removing GSs. To demonstrate this initial absence of an inclination to comply fully, it is pertinent to distinguish obstructionist non-compliance involving GS-related cases from other non-compliance cases referred to the CJEU under Article 260 TFEU. As mentioned before, the majority of cases referred to the CJEU under the penalty proceedings relate to the late implementation or incorrect transposition of the EU’s secondary law, namely directives. In relative

terms, this kind of non-compliance could be harder to resolve since it *requires* the MS to correctly transpose the directives, which at times could be achieved only through expansive legislative reforms of the existing national measures. In such cases, the MS is obliged to *legislate* in order to comprehensively comply. Firstly, the breach here is harder to repair as not only correct transposition is required, but also factual technical adjustments. Secondly, given that the wording of some of the directives could be obscure and imprecise, prompt and comprehensive compliance would be harder to achieve. Lastly, when it comes to compliance with judgments on secondary law, the MSs are not only obliged to correctly transpose such measures in order to comply in good faith, but also to ensure that the implemented rule is duly obeyed and correctly applied at the national level. For example, in relation to cases on incorrect application of EU's environmental law, the national compliance measures would often require for long-term and complex adjustments on the ground.⁶⁴ With GS judgments, it is different, since the MS is the only subject that is responsible to comply and to stop the infringement by taking all the necessary steps. Consequently, compliance with judgments on incorrect transposition by simple *repeal* is not suitable, whereas it could be practised with GSs-related judgments. In the case of compliance with GS-related judgments, the MSs are not obliged to correctly implement any particular EU secondary law and all that is required is to *repeal* GSs. In the case of GS-related judgments, the legislative adjustments which have to be initiated at the national level in order to achieve compliance are of a purely documentary nature only. In the case of GS-related judgments, compliance could be achieved swiftly. Therefore, since the Commission sets the ultimate compliance deadline for all judgments at twelve months, this study envisages that full compliance with GS-related judgments must be anticipated within six months.

However, according to Martinsen (2011: 945), judgments 'clearly provide more room for interpretation when national executives are to implement the supranational case-law than when implementing secondary legislation'. Following this thread of argument it could be claimed that when it comes to compliance with GS rulings, MSs would have more opportunities to avoid full repeal while trying to exploit possible justifications by further amendments. However, this study questions this statement by emphasising that when it comes to compliance with GSs, national

⁶⁴ Case C-278/01 *Spain*, note 6, (Spanish Bathing Waters) where Spain has failed to comply with Bathing Waters Directive 1976/160.

positions are indefensible due to the following reasons. Despite the uncertainty in interpreting the scope of any particular GS-case, the link between the protectionist measures and the infringement is reasonably clearly established, which signifies that state-driven protectionist laws have to be considerably amended/repealed or removed from the statutes of the company concerned. It is important to emphasise that in comparison to other cases which can result in obstructionist non-compliance, GS cases stand out as being legally complex, politically sensitive and requiring significant effort and resources both from the defendant and the Commission.⁶⁵

Current theories of compliance with EU law generally assume that MSs comply with the Court's judgments when the net benefits of compliance exceed the net benefits of non-compliance. From this point of view, non-compliance could be prevented by increasing the costs of non-compliance (Panke 2010: 23), and these costs could be increased by mobilising social and political pressure, as well as by increasing the publicity of the case and shaming the offending MS (Tallberg, Jönsson 2001: 18). The level of publicity and the visibility of a case are claimed to be two of the factors that directly influence the possibility of compliance (ibid). National constituencies and other state and societal actors can encourage their governments into compliance from below via shaming (Panke 2010: 8; Conant 1998, 2002). In addition, the price for non-compliance could be considerable for the MSs in much publicised cases that reach the headlines, as 'governments generally do not like to have their sins trumpeted on the front pages' (Beach 2005: 12). It is claimed that the joint effect of these factors could also increase the reputational costs. A number of scholarly contributions agreed that pressures from organised groups and institutions contribute to judicial policy impact in the EU (Alter 2001; Alter, Meunier-Aitshalia 1994: 535; Alter, Vargas 2000: 452; Conant 1998, 2002). However, as Conant (ibid) acknowledges, political mobilization on national level is only sometimes effective to facilitate compliance. Given that GS-related cases receive rather unique publicity and concern intense interests and values, it could be assumed that GS jurisprudence could increase social and political pressure to comply, as well as create considerable reputational losses in an event of shirking. However, this study provides the supporting analysis of motives for non-compliance and claims that when it comes to GSs protectionism *the public and government* could be strongly opposed to the Courts' judgment and the MSs are likely to resort

⁶⁵ SEC(2010) 1143 final, *supra* note 14, p.262.

to procrastination and inaction leading to non-compliance. Consequently, this study envisages that in GS-related cases the self-interest compliance would seem not to be an option, as compliance with GS judgments not only costs power and money, but could also imply high electoral losses and political resistance to compliance. This would support the claim made by Conant (1998) that reactions from national authorities, companies, organisations, and citizens could restrict the application of the CJEU's judgments. Consequently, it could be predicted that shaming campaigns are less likely to occur in GS-related cases, since the broad public is generally opposed to removing GSs and sides with the national government. Therefore, it could be claimed that the enforcement of compliance via shaming does not apply to GSs; on the contrary, governments could be strongly opposed to repealing GSs to avoid electoral losses. The MSs could be keen to avoid *electoral punishment*, as major national companies are also major employers and all those employees are voters. The voters' preferences over desirability of GSs mechanism could influence voting behaviour in national elections and since general public could be strongly opposed to GSs removal, they can express their interests regarding these policies and attempt to influence related political decisions (Gabel 2000: 55). The employees and the organised interest pressure groups may be opposed to the idea of their company being unprotected by government GSs and any threat of a subsequent hostile cross-border takeover could undermine the security of employment and social benefits of the employees. In such cases, to please both the voters and the Commission the MS's government could choose to shift to minimalist compliance by not repealing the GS measures but marginally amending them. Such an outcome could be expected particularly when upcoming elections are due. In this view, the increase of social and political pressure would not lead to the desired effect of increasing the chances of compliance, as the politicians and public would oppose full compliance with judgment. This study reveals that the 'visibility' prerequisite is of little relevance in ensuring compliance. Even though GS-related cases are highly publicised and stirred by discussions in leading European economic and legal publications, this does not preclude the MSs from resorting to non-compliance in the post-adjudicative phase, once the waters are calm again. Likewise, the prerequisite for 'direct compliance/non-compliance' also plays little role in facilitating compliance, as the MSs are left with wide discretion on the necessary compliance measures which could often be minimalist. In contrast, in cases where the

proceedings and the judgment under Article 258 TFEU resonate well with the on-going political and economic reforms regarding existing GSs, we would expect prompt and effective post-judgment compliance.

Some authors (Wasserfallen 2010: 1228) empirically show that the CJEU is taking up the leading role in policy-making and it is successfully promote distinct policy outcomes and shape new legislation ‘that would not have been in the zone of possible agreement without judicial activism’. Overall the CJEU enjoys a strong support within the academic community. However, current compliance studies largely fail to demonstrate if, and under what conditions, the EU’s compliance system and judicial policy-making would prompt the MSs to comply by embarking on policy changes at national level. For example Krämer (1993) revealed growing trend of non-compliance with environmental judgments. Several recent studies aimed to address the identified gap by studying instances in which MSs did not comply immediately (Panke 2007, 2010). Two studies by Panke (ibid) provide analysis of the scope conditions for the success of the enforcement system when applied to German and the UK cases on legal transposition of a social policy and environmental directives. In the latter study, Panke applied qualitative methods in order to empirically test the effectiveness of the compliance instruments (namely judicial discourses, judgments and sanction threats) in eight cases (four in each of the policy fields). Panke developed a fine-grained theoretical approach focusing on the interplay between the CJEU’s and domestic politics demonstrating that in majority of cases MSs complied as a result of application of two compliance instruments (judicial discourses and judgments). Even though Panke’s research has been nation- and issue-specific the case choice could be seen as eclectic spreading across two different policy fields. However Panke’s findings could not generalise the effectiveness of the enforcement system in other policy-areas, such as free movement of capital in single market. By narrowing this study to one policy area while encompassing all the existing case-law on the GSs issues this study aims to draw a distinctively different picture associated with compliance. Essentially, this study uses the research approach similar to Panke exploring the question of effectiveness of enforcement system across all judgments on GSs in eight MSs. Management and enforcement theories assume that judgments are effective as soon as they are applied. This study challenges this assumption.

6. Issue-related Factors, Research Hypotheses and Design

In order to assess the compliance conduct of each individual MS and to measure the extent to which each particular MS has respected obligations enshrined in the Treaty, this study developed a set of hypotheses. These hypotheses will be applied to each individual MS in question in order to assess the compliance conduct in each particular GS case. The hypothetical structure represents an assessment prism which would allow arriving at conclusions on compliance strategies and their effectiveness. The set hypothetical structure does not, in a way, tell us something about the bigger picture, neither is it used as an overall theme of this study. These hypotheses could only be used in a combination with the author's discretionary reading of reality.

This study considers three main and one supportive hypothesis on effectiveness of the enforcement system when applied to GSs-related case-law. The first hypothesis on enforcement effectiveness (H1) (which is also an obstructionist non-compliance hypothesis) states: *The first round enforcement procedure under Article 258 TFEU is a particularly weak compliance mechanism when applied to GSs, so MSs resort to obstructionist non-compliance and breaches of EU law could persist after the condemning judgment.* The hypothesis is confirmed, if following the judgment, the respective MS fails to promptly comply and the Commission had to initiate second round of infringement proceedings under Article 260 TFEU. This situation would signify that the MS resorts to unnecessary procrastinations, therefore causing *obstructionist* protectionism and non-compliance which could stretch on for years before the breach is remedied. In contrast, the hypothesis would be falsified if, during the course of the first round enforcement procedure, the MS's government comprehensively complies *within six months* following a judgment. In its recent Annual Report,⁶⁶ the Commission established that full compliance with the CJEU's judgment must be achieved within twelve months. As will be explained in section 5.1 of this Introduction, due to the specificity (and perceived simplicity) of the compliance obligations stemming from GS-related judgments, this study limits the ultimate compliance threshold to *six months*. In cases where full compliance is achieved within twelve months, the hypothesis on the effectiveness of the enforcement mechanism under Article 258 TFEU will be partially confirmed. If compliance is achieved after the twelve-month period, the MS would be seen to be

⁶⁶ COM(2013) 726, *supra* note 13, p.14.

engaging in unnecessary procrastinations, so acting in bad faith, undermining the effectiveness of the said enforcement instrument. If the said core enforcement effectiveness hypothesis holds, this leads to the supporting hypothesis on the effectiveness of minimalist compliance (H1a) which states: *The governments are not willing to withdraw from the use of GSs, so the measures would retain their protectionist force even after they were amended/partially repealed as a result of the ongoing judicial proceedings or as a result of the judgment.* This hypothesis is confirmed in cases where pre- or post-judgment compliance initiatives were of a minimalist nature, inadequate or incomplete. If the core effectiveness hypothesis holds, it points to a major puzzle comparable to one identified by Harker (2007) that: “[Member States’ governments are willing to weigh in the balance the adverse political consequences of a foreign acquisition against the cost of being held to account before the Court for an infraction of EU law several years in the future” (Harker 2007: 534). If the core enforcement effectiveness hypothesis holds, it also casts a shadow on the effectiveness of the infringement proceedings under Article 260 TFEU, raising the question of whether it is successful in facilitating compliance with GS-related judgments.

In 2010, a decade following the first condemning judgment on GSs, the majority (about 60%) of the total number of cases opened under second round infringement proceedings related to disrespect of the CJEU’s first round judgments on GSs.⁶⁷ The above fact leads to the second enforcement effectiveness hypothesis (H2) which states: *The second round infringement proceedings and associated penalty threats could fall short of persuading the MSs to duly and fully remove illegal GSs when the factual imposition of deterrent penalties is not likely in the foreseeable future.* In cases where a MS resists post-judgment compliance and the penalty procedure under Article 260 TFEU progresses to advanced stages, the second hypothesis will be supported. In instances where the MSs comply as soon as the penalty threats are applied and the procedure is initiated, the second hypothesis will be falsified.

Additionally in cases where certain GSs were overruled in a particular MS and the latter chooses to implement and maintain another set of GSs despite the EU institutions’ clear-cut position on the issue, the judgments on the foregoing GSs would be seen to have failed to trigger a wider policy change, and consequently the

⁶⁷ SEC(2011) 1093 final, *supra* note 36, p.286.

MS's government has failed to 'see the light'. Thus, the third hypothesis on the effectiveness of the agenda-setting case-law (H3) states: *A MS's government fails to embark on a wider policy change if similar GSs measures are implemented or maintained despite the infringement proceedings and condemning judgment on analogous GSs.* Such conduct would qualify as obstructionist non-compliance in bad faith. Above all, in cases where a MS chooses to use 'soon-to-be' overruled GSs measures in order to preclude cross-border capital movement, it would be seen as acting in bad faith towards compliance obligations. By addressing the above hypotheses this study is set to reveal the existence of an obstructionist and protectionist trend.

To understand and predict obstructionist behaviour in relation to GSs, it is necessary to explore some of the factors that could influence and/or predict compliance in good faith. For this purpose it is necessary to outline different country and industry variables which will be taken into account for a contextual compliance analysis in each particular country and for each particular case. Apart from the factors discussed above (the promptness of correspondence, the presence of pending takeovers, the application of GSs or the introduction of new GSs) the following analysis of issue-related factors and variables, though by no means exhaustive, can be helpful in setting the scene for predicting and explaining compliance with GS judgments. The aggregate effect of the reasons below could potentially be the reason for obstructionist non-compliance.

(a) *Overall compliance record.* Some studies on compliance argue that particular MSs are more likely to violate the Treaty freedoms than others (Beach 2005; Börzel 2003: 205; Börzel *et al* 2010: 3; Tallberg 2002). Generally, these studies predict compliance by taking into consideration the MSs' political power (share of votes in the Council of Ministers); its administrative capacity (the training and motivation of the administrative staff) and legitimacy (a moral obligation entailing that a rule or institution ought to be obeyed). Other studies reveal that MSs' political power, its administrative capacity and legitimacy do not determine its willingness to comply (Panke 2010: 5). Correspondingly, by approaching the non-compliance issue from the perspective of GS-related cases, this study demonstrates that resorting to obstructionist protectionism does not necessarily derive from the MSs' power or administrative capacity, as in some cases powerful MSs would comply promptly while weaker MSs could considerably resist compliance. Prior to

analysing factual compliance situations with GSs cases, this study comments on the overall compliance record for each jurisdiction, also taking into account general support for EU integration and policies. Specifically, this study predicts a higher degree of non-compliance with GS case-law in MSs with poorer records and in countries that display significant euro scepticism.

Yet this study has found only limited support for these predictions, as some MSs with better compliance records have demonstrated significant resistance to compliance, while others with poorer records have complied in good faith. Also, the most euro sceptic MSs could comply in relatively good faith in comparison to other countries that display more support the EU. Here another factor should be taken into account related to whether non-compliance with GS judgments is systemic and pathological for particular MS and whether there are numerous ongoing parallel infringements. In cases where judgments interlock and GS provisions interweave and correspond with one another, we would expect a higher likelihood of obstructionist non-compliance in bad faith.

(b) MSs' public service traditions are ultimately shaped by fundamentally different conceptions of the role of markets and the role of states. *Historic pre-requisites*, such as a country's traditions in respect of the free market versus state-driven protectionist, traditions could affect the MS's pull towards obstructionist protectionism. Here the historic links between the state and key industries will be contextually analysed, which could predict the obstinacy of GS measures. It could be predicted that in countries with state-influenced market economies characterised by strong traditions of state-driven *dirigisme*, post-judgment non-compliance would be more expected than in countries with co-ordinated market economies or liberal market economies. Additionally, the national rules for corporate control could have a significant influence on subsequent compliance. It could be ascertained that in MSs where the corporate control rules envisages a significant stakeholder participation in management of the company, the latter could be more protected from approaches of competitors and less exposed to undesirable corporate restructurings (Charny 1991: 439). Consequently since the objectives of public interest could be achieved through pressure groups and worker codetermination the government would be likely to withdraw unlawful GSs and comply. This leads us to the following variable which assesses the reasons and ideology behind the privatisation of strategic companies and liberalisation.

(c) Since GSs have largely evolved from *privatisation*, it is necessary to assess national specificities relating to this process, as this could shed light on the potential obstinacy of the GS measures. This study will assess the motives behind privatisation legislation in order to reveal any significant protectionist inclinations of the MS's governments. Across jurisdictions, some motives for privatisation prevailed over others. Some MSs demonstrated a stronger push towards market liberalisation and aimed at increasing the competitiveness of national companies, others privatised mainly due to budgetary motives, such as the pressure of economic needs, debts and deficits, as well as the move towards the establishment of a free market economy and the overall modernisation of the economy (e.g. Clifton *et al* 2006; Bortolotti, Siniscalco 2004; Vickers, Wright 1989). In countries that privatised primarily to raise revenues, as opposed to pursuing the idea of true liberalisation of industries, governments would be more likely to resist the removal of GSs. The extent to which the governments decided to privatise and open-up markets to free competition could also be one of the decisive factors that point towards the overall necessity of GSs. At this stage it is necessary to comment on the general openness of relevant markets.

(d) The *level of liberalisation* differs as MSs have liberalised at different speeds and different ways, which also differs from industry to industry. In cases where privatisation began at an earlier stage, allowing the strategic companies protected by GSs sufficient time to adjust to free market environment, the MSs would be more likely to demonstrate better compliance patterns with GS-related judgments than MSs in which privatisation commenced later. Generally, in countries where privatisation and market liberalisation started earlier, markets tend to be more open compared with countries that privatised at a later stage. Some of the most opened markets of network/regulated industries are telecommunications and airlines, and some of the most closed are energy generation services, on-land transport (railways) and postal services.⁶⁸ Regarding telecommunications, it is sufficient to note that this market has been regulated in great detail at the European level, so there is little room left for government interventions, such as GSs (Benyon 2010: 35). The market of network/regulated industries is the most liberalised in the MSs with co-

⁶⁸ For the data on market liberalisation on gas and electricity industries see European Commission Third Horizontal Evaluation (2004), SEC(2004) 866, p.88. For postal services see SZYSZCZAK (2007), p.150-164.

ordinated market economies, in particular in the UK.⁶⁹ Less market liberalisation could be observed in MSs with co-ordinated market economies, in which the enforcement of the free market rules experienced more resistance, such as in Germany and Italy. Generally, privatisations in MSs with co-ordinated market economies were based on more pragmatic reasons, whereas the privatisation programmes in the UK (and France) were more ambitious in scope and nature, while being ideologically inspired (Vickers, Wright 1989: 8). However, companies that were privatised and liberalised at the later stage, had more opportunity to grow into ‘national champions’ becoming a monopolies too big to be acquired, hence became takeover-proof (Bethel 1998; Clifton *et al* 2010). From this perspective, as Clifton argues, “a ‘wait-and-see’ logic may have proved advantageous [as] slower liberalisers took advantage of incumbents in countries that had liberalized previously (Clifton *et al* 2010: 1001).

(e) The *takeover regulation* in the given jurisdiction could also influence and predict compliance. The EU Takeover Directive was aimed at the harmonisation of national takeover laws, although it was considerably watered down and became a minimum standard directive containing only general principles. The Directive allowed the MSs to opt out of core provisions via the reciprocity rule under Article 12, giving governments a lot of leeway in transposing its provisions. Some MSs, such as Italy and Spain, transposed the Directive in a protectionist way, so launching a hostile takeover would be significantly more complicated and more expensive for the acquiring company and thus less likely to take place in those countries.⁷⁰ Other MSs’ takeover regulations, on the other hand, make it easy for foreign companies to launch hostile takeovers, as for example the UK takeover laws are very liberal. Existing differences in national takeover regulations alongside asymmetry in market openness across the MSs provide a competitive advantage for certain companies and as a result could distort competition and obstruct the achievement of a level-playing field. The aforesaid situation forces some MSs’ governments to attempt to balance this asymmetry by creating GSs in order to remedy the existing competitive advantages of others. This protectionist trend is on the rise even in the most

⁶⁹ SEC(2004) 866, *op. cit.*, p.83; European Commission, SEC(2007)1024, Fifth Horizontal Evaluation (2007), SWD, p.33; *also* BORTOLOTTI, FACCIO (2009), p.2930; HAAR, JONES (2008), p.2611.

⁷⁰ European Commission, SEC(2007) 268, Report on the implementation of the Directive on Takeover Bids.

liberalised and free-market oriented countries.⁷¹ It could be expected that countries which have transposed the Directive in a more liberal way would also most likely be ‘liberal’ towards their compliance obligations stemming from the judgments, in contrast to their counterparts that transposed it in a more protectionist way.

(f) Empirical studies have shown that *ownership complexity* and *availability of CEMs* deters hostile takeovers (Bebchuk *et al.*, 2000; Heiss, Köke 2004). Hence the presence of cross-shareholdings, large loyal shareholders and other CEMs, that are not subject to the breakthrough rule of the Takeover Directive, in companies protected by GSs could signify that compliance with GSs judgment would be more likely than in cases when share ownership is highly dispersed and there are no effective and powerful CEMs. Also, the availability of CEMs could be seen as one of the factors which could prompt compliance. The presence of powerful and effective CEMs in a jurisdiction could imply that the MS in question is more likely to comply by removing GSs: if powerful alternatives to GSs are readily available, additional safeguards, such as GSs, could be of limited importance.

(g) Even though the CJEU has established⁷² that national political, administrative or institutional difficulties could not qualify as an acceptable reason for non-compliance with EU law, this study nonetheless reflects on political and/or financial situations at the time of the judgment if those could potentially influence compliance. If there is a political crisis or pending elections, it brings about the electoral political pressure which could increase the chances that compliance will be postponed or minimalist measures implemented. This prediction draws a parallel with the Political Business Cycle hypothesis (McMenamin *et al* 2015: 49) which states that politicians are expected to inflate the economy before elections in order to win votes and austerity should not be expected before elections.

(i) The *situation in the market* for companies/industries in which GSs are implemented would also be an important part of the compliance assessment puzzle. If the said market is highly competitive and the company at stake represents a well-

⁷¹ For example after a hostile takeover of the UK-based company *CADBURY* by American multinational *KRAFT*, British politicians and the public called for initiatives to introduce a special law that would make takeovers which are not in the public interest less possible, see e.g. *Financial Times* (15/03/2010); *Financial Times* (3/05/2010). Similar protectionist trends are at times projected onto companies operating in defence and aerospace. For example, following a controversial investment by a Russian bank in *EADS* – a pan-European aerospace company, the German government has been considering the introduction of stringent GSs, see e.g. O’DONNELL (2010).

⁷² See e.g., case 301/81 *Commission v Belgium* [1983] ECR 467; case C-75/91 *Commission v Netherlands* [1992] ECR I-00549.

developed, internationally competitive entity it would be assumed that GSs have achieved their purpose and could be repealed in relatively good faith. Conversely, in cases where national privatisation/GSs legislation encourages the creation of national champions, a MS would be expected to considerably resist compliance.

(h) If GSs are implemented in *industries which are thoroughly regulated* at the EU level (such as telecoms), comprehensive compliance with judgments would be predicted – in contrast to GSs implemented in other strategic industries, for which EU legislation does not provide sufficient protection/regulation (such as energy).

All these factors have to be considered. This background analysis seeks to generate some predictions about whether the government is likely to comply post-judgment, also allowing to draw general conclusions on the reasons for non-compliance with particular judgments. It suffices to conclude that the more protectionist the overall outlook of the MS is, the more resistance to compliance is to be expected. In a similar vein, this study would predict a higher degree of resistance to comply in cases where the judgments of the CJEU allow for radical liberalisation which goes against the social models of some MSs, bringing additional legal restrictions on national systems (*e.g.* Höpner, Schäfer 2007; Scharpf 2008).

In order to probe the developed hypotheses, this study engages in careful process-tracing and concentrates on an in-depth analysis of compliance initiatives. It should be emphasised that compliance is extremely difficult to measure due to the numerous variables involved in its assessment. The situation of actual compliance could not be solely divided between comprehensive compliance and obstructionist non-compliance. There could be marginal variations in both outcomes, with different levels of good faith predispositions, or severities of bad faith behaviour. Though ultimate compliance is difficult to measure, it is even much more difficult to gather sufficient information on the nature and content of amended GSs due to the differences of legislative processes in each MS. Needless to say that ultimate compliance measures are drafted in national languages, so difficulties in tracking and translating these documents have been significant. However, restricting the analysis to GS-related judgments, it was possible to find and analyse in detail ultimate compliance.

This study sought to provide complete information about numerous transitory amendments and final compliance measures in relation to *sixteen*⁷³ GS-related cases in eight jurisdictions. In cases where overruled laws were amended, the content and motivation behind these compliance measures, as well as their deterrent effect, were assessed within the framework of the obligation to comply as soon as possible and in good faith. This study also sets out to determine whether the amended GSs could repeatedly hinder capital movement. The final amended GSs will be assessed according to their potential hindering effect. This study approaches non-compliance with GSs judgments from three levels of severity: firstly, resistance to compliance during the general enforcement action under Article 258 TFEU on the failure to comply with the Treaty freedoms could be seen as *relative* non-compliance; secondly, non-compliance with the subsequent judgment of the CJEU is considered as *obstructionist*; and lastly the initiation of a procedure for non-compliance with the original judgment under Article 260 TFEU is seen as *absolute* non-compliance. Two of the latter levels of non-compliance are expressly contrary to the sincere cooperation obligation and amount to *action in bad faith*.

An empirical and comparative analysis of GS-related judgments delivered between 2000 and 2011 allows for a remarkable observation. All judgments (apart from one that was justified) experienced (to a greater or lesser extent) some resistance to full compliance. Cases where the Commission terminated proceedings are not considered in this study. The following operative part puts the research hypotheses to the test, carrying out contextual analysis of compliance with GS judgments in different jurisdictions over a period of more than ten years. A discussion of the post-adjudicative phase will be the focus. Here, the contextual analysis of the factual background data is essential as it is required to assess the scope of the compliance obligations. For this purpose, the circumstances of each particular case will be considered – such as the route by which the case reached the Court; the history of companies in which GSs are present, the subject matter of the dispute; the public and national interests involved.

This part of the study draws GS-related cases into clusters by their country of origin and evaluates them in chronological order. This approach was chosen due to the fact that many cases build on each other. The reaction of each MS to a potential

⁷³ Cases C-95/12 *Commission v Germany*, note 18, and C-196/07 *Commission v Spain*, note 17, are not included in the count.

hostile takeover of the company at issue and the reaction to the referral to the Court and finally reactions to the judgment will be assessed. This information will help to understand and predict the pull towards possible non-compliance. This study therefore generally draws on sources which form the basis for compliance with the CJEU's judgments. This broad variety of sources ranges from the case-law of the CJEU to national legislation, from the Commission's communications to academic contributions. It assesses and analyses information from primary sources on judicial disclosures, newspaper articles,⁷⁴ as well as public statements, strategy papers and statutes of the companies concerned. The primary sources for assessing compliance for the purpose of this study are official publications by the Commission and the MSs. Primary documents of respective national and EU institutions will be used to assess the MSs' compliance initiatives aimed at amending the GSs in question. These documents are assessed and analysed in order to evaluate possible justifications, as well as the necessity for further amendments. Secondary sources include recent academic research on the theory of compliance, coupled with research on privatisation, the liberalisation of national markets and GS issue.

Chapter 1 of Part II is on 'firm standing' Italian Decree-Laws - the chain of cases which could be seen as a typical example of obstructionist protectionism: C-58/99 *Commission v Italy* [2000] ECR I-03811, C-174/04 *Commission v Italy* [2005] ECR I-4933, C-326/07 *Commission v Italy* [2009] ECR I-02291 and joined cases C-463/04 and C-464/04 *Federconsumatori v Comune di Milano* [2007] ECR I-10419. Here compliance is assessed by examining how GSs stemming from the decree-law were amended, why these amendments could be seen to be avoiding full compliance, and which actions and amendments could be seen as an ideal solution for facilitating compliance? The outcomes of these re-drafting activities are the subject of comparative analysis with the original GSs. Thereafter these amended GSs are assessed by their potential protectionist powers. Furthermore penalty threats under Article 260 TFEU are assessed.

Via the same method used in assessing the Italian cases, Chapters 2-8 assess:

Case C-463/00 *Commission v Spain* [2003] ECR I-4581,

Case C-274/06 *Commission v Spain* [2008] ECR I-00026,

Case C-207/07 *Commission v Spain* [2008] ECR I-111,

Case C-196/07 *Commission v Spain* [2008] ECR I-00041,

⁷⁴ All newspapers were accessed in their electronic version as available on *Lexis-Nexis* database.

Case C-98/01 *Commission v United Kingdom* [2003] ECR I-4641,
Case C-483/99 *Commission v France* [2002] ECR I-4781,
Case C-503/99 *Commission v Belgium* [2002] ECR I-4809,
Joined cases C-282/04 and C-283/04 *Commission v Netherlands* [2006] ECR
I-9141,

Case C-112/05 *Commission v Germany* [2007] ECR I-8995,
Case C-95/12 *Commission v Germany* [2013] ECR I-0000,
Case C-367/98 *Commission v Portugal* [2002] ECR I-4731,
Case C-543/08 *Commission v Portugal* [2010] ECR I-0000,
Case C-171/08 *Commission v Portugal* [2010] ECR I-0000,
Case C-212/09 *Commission v Portugal* [2011] ECR I-0000.

Conclusions will be brought on the above analysis and the enforcement effectiveness/obstructionist hypotheses will be proved or dismissed. The concluding Part III evaluates the findings of this study and identifies factors which have proved to promote compliance in good faith or to encourage obstructionist non-compliance. Further emphasis has been laid on areas where improvement is needed. This part will also suggest further directions for addressing GS judgments in the future and will comment on the recent developments in the area of GS-related case-law. This study concludes with an actual compliance situation on GS cases and an evaluation of the prospects for the future.

Though the record for the GS-related judgments has been fairly positive, the factual assessment of the MSs' compliance is yet to come. When all is said and done, the analysis of the actual compliance pattern will show that while much is left to be done, state-driven protectionism remains obstructionist and cannot be overcome without a significant battle. The following part of this research will put the hypothesis of obstructionist GSs protectionism to the test.

PART II. EVIDENCE: COMPLIANCE WITH GOLDEN SHARE JUDGMENTS - A CASE STUDY

The following operative part focuses on the GS-related case-law by assessing the extent to which the CJEU's judgments have solved the underlying issue of non-compliance in those cases. This is done by concentrating on the analysis and evaluating the outcome of national pre- and post-judgment compliance activities. The examination of compliance will determine whether the MSs have been acting in good or in bad faith towards their obligations under the Treaty. The findings will determine that in the majority of cases MSs tend to resort to non-compliance and initial amendments to GS laws tend to retain their protectionist powers. This supports the core enforcement effectiveness/obstructionist hypothesis of this study, which maintains that MSs are likely to resort to non-compliance following the judgments on GSs, so acting in bad faith and contrary to the sincere cooperation obligation under Article 4(3) TEU.

1. Italy: Firmly Standing Golden Share Laws

Introduction on Jurisdiction

The government's protectionist policy legacy and control over strategic industries has had a lasting history in Italy: companies have been extensively used for attaining non-economic, political and social goals (Bianchi *et al* 1989: 84-95; Bortolotti, Milella 2006: 9). Traditionally the government controlled all public services and its wide discretion in this sector has been accepted as the norm (Della Cananea 2002: 74-5). Such an interventionist anti-market approach has been, to some extent, protected by the Constitution, where Article 43 reserves special rights for the state in strategic sectors.⁷⁵ Therefore, Italian protectionism is a powerful tool that is rooted in legal tradition. At the beginning of the 1990's Italy was eager to meet the Maastricht criteria and secure participation in the European Monetary Union, so privatisation (followed by liberalisation) came as a convenient solution (Bull, Newell 2005: 222-4). Widespread privatisation swept across Italy, yet the government was more concerned about increasing its revenues rather than in true liberalisation of the said markets (ibid). In 1994 the government led by Prime

⁷⁵ See ANNEX III of this study.

Minister Berlusconi paid its tribute to protectionist traditions: to retain influence over former SOEs it has implemented the privatisation legislation law of 1994⁷⁶ allowing for the creation of GSs in strategic companies. Apart from the possibility to implement GSs, Italian companies have been protected through a complex web of effective CEMs such as pyramids and cross-shareholdings, in which influential families and powerful credit institutions worked as allies to control Italian industry, excluding the feasibility of hostile takeovers (Bull, Newell 2005: 179).

Once the Maastricht requirements were met eagerness for integration has significantly diminished and the obstacles to the free market have been maintained and reinforced (ibid, 224-6). Such protectionist approach has reversed the success of the ‘energetic’ privatisation and has also considerably slowed down (if not put on hold) the true liberalisation of strategic industries. It suffices to note that Italy could generally be seen as a MS that is reluctant to use its own initiatives to open up its markets and reluctant to reform its laws, so that most of the recent changes have been strongly influenced by the EU (ibid, 223; Della Cananea 2002: 73, 88; OECD 2001: 6). Italy is one of the largest economies in the EU yet, as regards non-compliance with EU law, it could be seen as the ‘extreme outlier’ who is renowned for its continuous disobedience and that is accountable for almost a quarter of delayed compliances with the CJEU’s judgments (Beach 2005; Börzel 2001: 818-20; Tallberg 2002: 629). The test for compliance with GS judgments will disclose whether Italian obstructionist traditions could be overcome by a newly established law of the CJEU. The conclusion on each particular case will reveal if Italy has acted in good faith towards the sincere cooperation principle when addressing the compliance obligations stemming from four GSs judgments.

⁷⁶ Decree-Law No.332 of 31/05/1994 (*GURI* No.126, 1/06/1994), converted with amendments into Law No.474 of 30/07/1994, (*GURI* No.177, 30/07/1994).

1.1. The First Golden Share Case on Privatisation Law of 1994

After the Commission's communication of 1997⁷⁷ explicitly specified that unjustified GSs are incompatible with the Treaty, the CJEU has further supported this view in its first judgment on the Case C-98/99 issued in 2000 on Italian GSs. This sub-chapter proceeds as follows: Section 1.1.A provides factual background data on origin and composition of GSs. Section 1.1.B examines Italian conduct during the infringement procedure, assessing its defence strategy and any compliance initiatives disclosing whether there has been an inclination to comply prior to the judgment. Section 1.1.C assesses Italy's compliance initiatives providing the basis for the evaluation of any push towards obstructionist protectionism and helping to predict the potential non-compliance. Section 1.1.D analyses whether Italy has acted in good faith when addressing the judgment. The latter section also presents the potentially 'best-case scenario' for facilitating compliance, helping to understand Italy's motivation behind implemented compliance measures. This analysis would support the hypothesis of obstructionist GSs protectionism, concluding that the Italian government resorted to non-compliance.

1.1.A: Special Rights

Pursuant to Article 2 of DL 332/1994 (as converted with amendments into Law No.474/1994), the government would issue further company-specific decrees which would apply to companies controlled by the government and operating in public service sectors. These company-specific decrees would determine that before adoption of any measures resulting in the loss of government control, a special GS provision must be inserted into each company's statutes by a decision taken at an extraordinary AGM and conferring one or more special rights to the Treasury Minister. The Law of 1994 then listed special rights which could be implemented, such as the special right to: (a) issue express approvals or oppositions on acquisition by any investor of stakes representing at least 5% of voting share capital (approval); (b) approve agreements between major shareholders representing at least 5% of voting share capital; (c) veto amendment of the company's statutes and decisions on strategic reorganisations, such as merger, dissolution, transfer of businesses or registered office; (d) appoint a minimum of one or several (up to one quarter of the

⁷⁷ European Commission (1997) Communication on Certain Legal Aspects concerning Intra-EU Investment, OJ, C 220/06.

total number) directors and an auditor. The approval regime on acquisition had to be issued within sixty days following each notice and until the expressed approval was gained a stand-by clause would apply, depriving the acquirer of any non-economic rights attached to the shareholding at issue. In case of express opposition or absence of approval following the expiry of the sixty day period each relevant acquirer would have to dispose of its shares within one year or be ordered to do so by the national Court. The same sixty day period applied to the approval regime on shareholders' agreements: following the express opposition or absence of approval after the expiry period agreements were deemed ineffective.

After the implementation of company-specific decrees the Treasury Minister would define contents of the special rights in each particular case by further decrees, which could also lower the 5% threshold for the purpose of the special approval regime. As could be seen from the said GS provisions, special rights were not attached to specific 'golden' shares held by the government, instead the DL 332/1994 directly granted the state authorities with time-unlimited special rights which had to be used by 'having regard to national economic and industrial policy objectives'.⁷⁸ Article 1(5) of Law No.474/1994 also contained a discriminatory provision providing that the government may entrust the execution of certain tasks to professionals who have been officially registered in Italy for at least five years. The latter provision clearly discriminated against professionals established in other EU MSs or those recently established in Italy.⁷⁹

As seen from the provisions at issue, Article 2 of Law No.474/1994 enabled the government to issue further decrees determining which companies have to become subject to GSs and subsequently empowering the relevant authorities to further determine the contents of special rights. Article 2 of Law No.474/1994 does not create GSs but merely enables their further implementation, so it does not constitute an obstacle for EU law *per se*. However, since the main purpose of the provision was to *enable* the creation of GSs by further decrees it represents a clearly protectionist piece of legislation. On the other hand, further decrees which actually implemented GSs had to specify not only the contents of particular special rights, but also any conditions for their application. Therefore, Article 2 of Law No.474/1994 does not infringe the freedom of capital movement and establishment

⁷⁸ Case C-58/99 *Italy*, note 24, para.4.

⁷⁹ *Ibid*, para.1.

for as long as GSs implemented pursuant to it could be justified by those further implementing decrees or, perhaps, by companies' statutes. Yet, as revealed below, neither subsequent company-specific decrees that implemented GSs, nor the companies' statutes provided for any such further justifications.

Provisions of 1994 privatisation law were soon put to use when the government chose to implement GSs for the most valuable companies prior to their privatisation. Italy has privatised its state monopoly *Telecom Italia (TI)* – this became the largest privatisation within the EU at the time (Bull, Newell 2005: 185). In 1997, pursuant to Article 2 of Law No.474/1994, the government implemented a decree providing that GSs must be introduced in *TI*'s corporate statutes.⁸⁰ Two days later, the Treasury Minister issued two further decrees: first - establishing the composition of GSs and second - lowering the relevant 5% threshold for the purpose of the approval regime to 3% of voting share capital.⁸¹ Here it should be emphasised that by lowering the threshold for the application of special GS regime from 5% to 3% of voting share capital, the Minister has made the provisions of Law No.474/1994 even more stringent – more acquisitions and agreements would now be subject to approval.

In 1995 the government inserted corresponding GSs provisions into the corporate statutes of *ENI* – Italy's largest energy/oil company.⁸² The Treasury Minister applied GSs provisions of enabling Law No.474/1994 to the fullest extent by implementing the entire spectrum of special rights at hand in both companies' statutes, creating approval regimes for both acquisitions of stakes and major shareholders' agreements representing at least 3% of voting share capital, rights to veto companies' reorganisations and also rights to appoint a minimum of one or several directors and an auditor. The Ministerial decrees have not made the exercise GSs in *ENI* or *TI* subject to any further conditions and there were no further justifications for GSs application in both companies' statutes.⁸³ The conditions for exercise of special rights, or more precisely their absence, have become the subject of the following judicial proceedings.

⁸⁰ Case C-58/99 *Italy*, note 24, para.1.

⁸¹ *Ibid*, para.6.

⁸² *Ibid*, para.5.

⁸³ Article 6 of *ENI* statutes of November 2010; Article 22 of *TI* statutes of August 2011, available from companies' web sites.

1.1.B: Negotiations and Judicial Proceedings

The EU Commission has formally notified Italy that the GSs implemented pursuant to provisions of Law No.474/1994 and companies' decrees infringe the Treaty freedoms of capital movement and establishment. The Italian government led by Romano Prodi insisted on compatibility of its laws justifying GSs by the necessity to guarantee a minimum level of provision of oil supply and telecom services to the general public (European Commission IP/98/717). On 10 August 1998 the Commission issued a reasoned opinion, allocating two months for compliance.⁸⁴ At that time Italy went through governmental elections and the newly elected government led by Massimo D'Alema replied (with a twelve day delay), undertaking to amend the law in question. However, apart from a declamatory conformity with the Commission's observations, the government did not provide any supporting evidence of potential amendments or their proposed implementation date.⁸⁵ There was no effective compliance by the date stipulated in the reasoned opinion, as the amendments have not been submitted to the Italian Parliament.⁸⁶ On 19 February 1999 the Commission lodged an application to CJEU.

At this point a short diversion to the situation on the Italian telecom market is necessary as it might shed some light on the disclosure of the relevant GSs and explain the Commission's pro-active approach on the matter. The infringement proceedings coincided with the largest takeover battle of that time when in February 1999, *TI* became a target of a hostile bid by another Italian company *Olivetti* - corporate attacks of this kind were unprecedented in post-war Europe (Bull, Newell 2005: 187; BBC News Online 29/02/1999). The Italian government favoured the takeover, yet *TI* management and shareholders were strongly against it (BBC News Online 26/02/1999) and sought to accept a friendly 'super merger' with the German company *Deutsche Telekom* instead (Negrelli 1999: 27; BBC News Online 12/04/1999). The Italian government turned against a merger with a foreign company, in which the German government was a major shareholder (Bull, Newell 2005: 189). Knowing that the government could block this controversial merger, the two Italian companies had to come to terms with the government and the hostile takeover by *Olivetti* eventually went through (BBC News Online 22/05/1999). The

⁸⁴ Case C-58/99 *Italy*, note 24, para.8.

⁸⁵ *Ibid*, para.9.

⁸⁶ *Ibid*, paras.9&10.

Olivetti takeover battle and unsuccessful cross-border deal involving the German company points towards the Italian government's protectionist stance and this is how the GSs could come to the forefront – by promoting complaints to the Commission from unsatisfied shareholders.

Returning to the judicial proceedings the Commission criticised discriminatory provisions of Article 1(5) of Law No.474/1994 which applied to professionals, also arguing that GSs applied pursuant to Article 2 could not pass the legal certainty and proportionality test.⁸⁷ According to the Commission it was not clear in which circumstances special rights could be applied, in which circumstances the governmental approval would be granted or refused, thus leaving the state authorities with wide discretionary rights. During the judicial stage Italy has not denied that the relevant provisions of Law No.474/1994 are incompatible with the Treaty. Moreover the government has not just merely re-iterated its intention to adopt necessary amendments to the law at issue and comply with the reasoned opinion, but went even further by revealing at the hearing that the necessary compliance measures have already been approved (and GSs justified).⁸⁸ Even though the amendments allegedly were on their way to adoption, the CJEU ruled that they cannot be taken into account since non-compliance with the Treaty persisted following the two months allocated by the reasoned opinion.⁸⁹ On 23 May 2000 the CJEU ruled that by adopting Articles 1 and 2 of Law No.474/1994 and the decrees concerning GSs in *ENI* and *TI* Italy has failed to fulfil its obligations under the Treaty on free movement of capital and establishment.

1.1.C: Assessing Potential for Compliance

Italy has revealed its intentions to comply pre-judgment, so its only defence at the proceedings has been its active engagement in implementation of compliance measures which would eventually justify GSs. At the hearing the government has updated the CJEU on the progress of its law-drafting activities, confirming that the Law No.488/1999⁹⁰ would address the Commission's concerns by amending GSs so they would meet the legal certainty and proportionality requirements.⁹¹ On 11

⁸⁷ Case C-58/99 *Italy*, note 24, paras.12&13.

⁸⁸ *Ibid*, paras.14-16.

⁸⁹ *Ibid*, paras.17-19.

⁹⁰ Article 66 of Financial Law No.488 of 23/12/1999 (*GURI* No.302, 27/12/1999).

⁹¹ Case C-58/99 *Italy*, note 24, para.16.

February 2000 Prime Minister D'Alema had implemented a further DPCM/2000⁹² which defined the criteria for the exercise of special rights of Article 2 of Law No.474/1994. From the moment when Italy officially undertook to comply with the Commission's observations until the judgment it had nineteen months to comply on its own initiative. The alleged compliance came on 11 February 2000, or three months prior to the judgment. If Italy's compliance measures were sufficient to remedy the breach of the Treaty it would indicate that it has cooperated sincerely by complying both with the Treaty provisions and by promptly complying with the subsequent judgment. Since at the time of implementation of the above compliance measures Italy has not yet been obliged by the condemning judgment to amend its GS law, it could be perceived that the government complied on its own initiative and in good faith – in line with the Union's objectives and principles. The timing for potential compliance has been adequate, but the real question remained: whether the amendments themselves were sufficient and could they be seen as compliance measures that are in line with the good faith and sincere cooperation principles?

In a situation where the implemented compliance measures would not justify the application of GSs, the question of non-compliance would immediately arise again. However in such a setting, non-compliance would evolve into an infringement of EU law at a significantly different level: non-compliance with EU law prior to the judgment and non-compliance with the condemning judgment constitutes an infringement of a different quality. Despite the allegedly good-natured pre-judgment amendments the CJEU's judgment from 23 May 2000 has bound Italy to comply. Nevertheless the Italian authorities were free to decide on how to comply, as they were not obliged to repeal the enabling provisions of Law No.474/1994 altogether.

In this setting the insufficiency of the pre-judgment amendments, which would inevitably trigger non-compliance with the judgment could be envisaged due to the following reason: the condemned GS law ought to be repealed and not amended. However, since Article 2 of Law No.474/1994 merely represents an enabling measure, the government would most likely be willing to try and pass the justification test by amending the conditions for exercise of special rights. If

⁹² DPCM of 11/02/2000 'Defining the criteria for the exercise of the special powers of Article 2 of Decree-Law No.332 of 31/05/1994, converted after amendments to Law No.474 of 30/07/1994' (*GURI* No.40 18/02/2000), available in Italian at: <http://www.gazzettaufficiale.biz/atti/2000/20000040/000A1760.htm> (last accessed on 04/06/2015).

subsequent amendments would not pacify the Commission, they could be repeatedly amended by testing justification criteria over and over again. For the reason that the potential number of these justification attempts or compliance measures could become very high would make the enabling GSs provision of Law No.474/1994 an obstructionist piece of legislation. Put simply, the Italian government would most likely be inclined to continuously amend the way in which GSs are applied instead of wholly repealing enabling provisions of Law No.474/1994.

This situation would leave the Italian authorities with a wide discretion for manoeuvring and avoiding full compliance which ideally would involve a complete withdrawal from application of GSs and relevant approval regimes. The following Section 1.1.D first analyses the possible ‘best-case scenario’ for facilitating compliance with judgment on case C-58/99, then turning to examine implemented compliance measures, testing them against the sincere cooperation principle and obligation to comply in good faith. It will assess whether unjustified GSs have remained intact after the alleged amendments or not.

1.1.D: Compliance v Non-compliance

What could be seen as optimal compliance with the judgment on case C-58/99? Firstly, the government had to repeal the discriminatory Article 1(5) of Law No.474/1994 or make it non-discriminatory. Since the objective of his provision was merely to distinguish between professionals who have been officially registered in Italy for certain period of time and all other professionals, recasting the discriminatory manner in which this provision applies would make its purpose irrelevant. Secondly, it would be improbable to justify such restriction on the grounds of overriding interests of the public or its security, as it would be virtually impossible to explain why entrusting the execution of certain tasks to professionals who have been officially registered in Italy for at least five years is necessary for protection of the public interests and security. In this light appropriate compliance would involve full repeal of Article 1 of Law No.474/1994. The following analysis will show that the amendment of Article 2 of Law No.474/1994 would not be as straightforward.

Article 2 of Law No.474/1994 is the legal basis for the creation, implementation and activation of GSs by further company-specific decrees, so abrogating this basis would eliminate the possibility for maintaining and

implementing similar GSs in the future. Simply put: if there are no provisions enabling the implementation of GSs, there would be no necessity for their justification, so the preferable solution for facilitating compliance with judgment on case C-58/99 would be to repeal the enabling Article 2 of Law No.474/1994. However, as GSs could potentially be justified, Italy chose to amend the way in which GSs would be applied in order to try and pass the legal certainty and proportionality test. Since this test is usually very difficult to pass, any amendments to GSs would have the potential for being inappropriate compliance measures, so any insufficiency of justifications would leave room for further infringements. As predicted by the supporting hypothesis on effectiveness of minimalist compliance (H1a), any unsuccessful justification could retain some level of state discretion and postpone full compliance, ultimately leading to obstructionist non-compliance. Taking the potential insufficiency of any subsequent amendments to GSs coupled with Italy's lasting tradition of state-driven protectionism in the public sector, it has been assumed that Law No.474/1994 would not be amended appropriately. In this light, fully repealing Law No.474/1994 would make a proper and better compliance measure.

The CJEU did not take amendments to Law No.474/1994 into consideration, so these measures were spared from judicial scrutiny: it has not been considered whether Law No.488/1999 and DPCM/2000 have justified GSs and whether Italy had adequately complied. Before embarking on the analysis of these compliance measures it would be reasonable to look at the final legislative outcome which could be obtained directly from the statutes of the companies concerned. Statutes of *ENI* (2013)⁹³ and *TI* (2014)⁹⁴ reveal that the Italian government continues to maintain special rights based on Article 2 of Law No.474/1994 as amended by laws of 2003⁹⁵ and 2004,⁹⁶ so there is no reference to Law No.488/1999 or DPCM/2000 whatsoever. Firstly, the mere presence of GSs a decade following the condemning judgment points towards an obstructionist character of relevant provisions overruled back in 2000 also suggesting that Article 258 TFEU has been ineffective in facilitating effective compliance. Secondly, the finding that GSs were repeatedly amended in 2003 points to the fact that the pre-judgment compliance measures of

⁹³ *ENI* statutes of February 2013, Article 6.

⁹⁴ *TI* statutes of March 2014, Article 22.

⁹⁵ Law No.350 of 24/12/2003, 'Financial Law for 2004' (*GURI* No.229 of 27/12/2003) available in Italian at: <http://www.camera.it/parlam/leggi/03350l.htm> (last accessed on 24/09/2014).

⁹⁶ DPCM of 10/06/2004 (*GURI* No.139 of 16/06/2004).

1999 and 2000 were insufficient, suggesting that the supporting hypothesis on effectiveness of minimalist compliance (H1a) would be confirmed for this case. Subsequent compliance tests would solve the puzzle by revealing what these controversial compliance measures actually were and if they were adequate.

At the hearing Law No.488/1999 represented the sole Italian defence and the government claimed that it justifies application of GSs.⁹⁷ Article 66 of Law No.488/1999 entitled ‘Method of disposal of the shares held by the state’⁹⁸ contained an explanation under which circumstances and how Article 2 of Law No.474/1994 should be executed. In a nutshell, the objective of Article 66(1) of Law No.488/1999 was to exclude application of GSs to relatively small companies, in which the state holds only a minor stake. This would constitute a non-controlling investment which is of limited importance for the objectives of national economic and industrial policy. Before this amendment, the state had a wide discretion on implementation of GSs which could have been created for any company operating in the public service sector – no matter how small or how important. Article 66(3) of Law No.488/1999 also contained the alleged justification providing that GSs should be introduced only for important and compelling reasons of general interest, in particular with reference to public order, public safety, public health and security and be appropriate and proportionate for the protection of those interests. The provision further maintained that GSs should be exercised in accordance with the principles of EU law, primarily the non-discrimination principle should be consistent with the objectives of privatisation and protection of competition and the free market principles. Article 66(4) of Law No.488/1999 established that further decrees shall define the criteria for the exercise of GSs and the special approval regime which must also be based on objective criteria, be stable and made public beforehand.

Prima facie, the amendment of Law No.488/1999 could appear as a ‘good intention’, but in essence it represents an inadequate compliance initiative, as it merely acts as a smoke screen dispersing the attention from active GSs. Additionally, Article 66 of Law No.488/1999 does not address the discriminatory provision of Article 1(5) of Law No.474/1994. What it does do is the following: it merely divides companies which operate in the public sector into two categories:

⁹⁷ Case C-58/99 *Italy*, note 24, para.16.

⁹⁸ Article 66 of Financial Law No.488 of 23/12/1999, *supra* note 90. Text in Italian available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:1999;488> (last accessed on 24/09/2014).

those that are of great value and strategic importance, and those of less value or importance, maintaining GSs for the former category companies. This division is certainly of some value, as it excludes some companies from the application of GSs. However this division is actually of little importance, as the Italian government seems to confuse quantity with quality: excluding a number of smaller and less important companies from the potential ‘list of protection’ while retaining the largest and most strategically- important on it. It is important to emphasise here that these relatively small companies are not essentially relevant in the context of European competition as they are minor players in the European market. Moreover this ‘justification’ does not address the judgment on case C-58/99 as *TI* and *ENI* companies clearly qualify to fall under GSs provision.

The remaining GSs in large strategically-important companies had to be justified. To this extent Law No.488/1999 merely declares that the special rights should be applied in a non-discriminatory manner and only in overriding circumstances in the compelling interest of the general public: its order, safety, health and security. These provisions are of a declamatory character and in essence repeat the requirements for the barriers to fundamental freedoms to be compatible with the Treaty. By solely proclaiming that the GSs should be applied only in overriding circumstances in the compelling general public interest, but without actually specifying what precisely those circumstances and interests could include, does not make GSs more legally certain – and this once again leaves a wide discretion for the government. Controversially, merely referring to act in accordance with the free market objectives and the EU law principles, and generally committing to base GSs on stable objectives, would not justify the use of these measures *per se*. Justifying the national piece of legislation that has been found to be in breach of EU law by solely committing to act in good faith does not make the existence of this legislation or its exercise justified. Amending incriminated GSs in good faith would, first and foremost entail the government to severely restrict their application by laying down a very limited and precise criterion for their exercise. According to Article 66(4) of Law No.488/1999 further decrees had to define such criteria – this was the purpose of DPCM/2000.⁹⁹

The DPCM/2000 specified in which circumstances the Treasury Minister could oppose acquisitions of stakes above 5% of the voting right ceiling pursuant to

⁹⁹ DPCM of 11/02/2000, *supra* note 92.

Article 2(a) of Law No.474/1994. Pursuant to DPCM/2000, opposition could be applied to acquisition of shareholdings which: (a) would allow taking over control of the company only where the acquirer and its industrial objectives and programmes could not be identified; (b) could hinder liberalisation of the market and /or are inconsistent with the established privatisation policies or create conflict of interests; (c) involve objective risks for the company to become involved in illegal activities; (d) are detrimental to the maintenance of GSs; (e) subject to substantial risk of causing serious damage to the vital interests of the state with regard to the independence and uninterrupted supplies of essential raw materials and goods, uninterrupted supply of essential public services and the security of the relevant installations and networks and the development of high-technology sectors (European Commission IP/03/177).

The above criterion for exercise of GSs could once again be very broadly interpreted since the government did not specify in which particular instances acquisitions could hinder the opening-up of the markets; what are those conflicting interests which could be affected by such acquisitions and what exactly are the vital interests of the state. Pursuant to DPCM /2000, the abrogation of GSs was virtually impossible and in fact, any hostile takeover situation would be detrimental to the maintenance of GSs. Therefore, amendments to GSs by DPCM/2000 do not implement substantial changes to how and under which particular circumstances GSs could be used. In this light, (even following the amendment) the criteria for GSs application was not entirely precise, leaving discretionary rights to the Treasury Minister, meaning that the legal certainty requirement could not be satisfied.

Therefore, the amendments of 1999 and 2000 do not address the judgment on case C-58/99, as they leave the Law No.474/1994 principally unchanged and GSs unjustified. This supports the earlier finding that GSs implemented pursuant to Law No.474/1994 could be of obstructionist character and that Italy would most likely persist in non-compliance by maintaining GSs even after they were overruled by the CJEU. This finding goes in contrast with the statements not only by the Italian government, but also by several international organisations and the Commission itself. For example, in 2003 the OECD commented that pursuant to amendments of Law No.488/1999 and DPCM/2000 GSs are applied ‘for very limited public interest

reasons' and only in strategic industries.¹⁰⁰ It is important to note that in 2001 the Commission revealed that the proceedings on Italian GSs which were firmly on its infringement agenda for months following the condemning judgment on first GS case were terminated in 2001.¹⁰¹ What is clear is that relevant GSs were retained despite the condemning judgment and terminated infringement proceedings. Similarly in 2005, the EU Commission services stated that the amendments have significantly scaled down the scope of GSs in both *ENI* and *TI* following the ruling.¹⁰² Despite such positive outlook on the compliance measures: what appears to be clear from this analysis is that amendments of Law No.488/1999 and DPCM/2000 were insufficient which confirms the supporting hypothesis on effectiveness of minimalist compliance (H1a). Moreover, discriminatory provision of Article 1(5) of Law No.474/1994 remained unaffected by these amendments.

The above analysis brings us to the conclusion that Italy had sufficient time for effective compliance with the judgment on case C-58/99 and, in order to comply in line with the sincere cooperation principle and in good faith, the enabling provisions of Law No.474/1994 had to be repealed altogether (and not just amended). Resistance to comply and repeal GSs alongside the inadequate amendments, made Italy act in bad faith and contrary to the sincere cooperation principle: a very disturbing situation indeed. By implementing Law No.488/1999 and DPCM/2000 and by maintaining GSs in statutes of *TI* and *ENI*, the Italian government (at a time led by Massimo D'Alema) resorted to obstructionist non-compliance with the ruling on case C-58/99. This situation would trigger the necessity for subsequent amendments which would result in further judgments by the CJEU in which it would once again question the compatibility of GSs introduced pursuant to Law No.474/1994. The obstructionist GSs implemented pursuant to Law No.474/1994 will be brought up in the subsequent case analysis as the battle for their abolishment will sprawl for over a decade. This study will return to the Law No.474/1994 and further compliance assessment on case C-58/99 at the later stage of this study.

One year after the first GS judgment on Italian case C-58/99, the Commission issued a communication reconfirming its position on GSs by making it sufficiently clear that there is no place for unjustified GSs (which should not be maintained or implemented) in the area of the energy market (European Commission IP/01/872).

¹⁰⁰ OECD (2003), *supra* note 25, p.108.

¹⁰¹ COM(2002) 324 final, *supra* note 14, Annex III, p.4.

¹⁰² OECD (2003), *supra* note 25, pp.107-8; European Commission, SWD (2005), *supra* note 25, p.13.

However, in the very same year, Italy has implemented yet another GS law specifically aimed at controlling the energy sector. The judgment on these GSs and subsequent compliance will be examined in the following sub-chapter.

1.2. Urgent Golden Shares for Energy Market

This sub-chapter begins with a short introduction into the issue of liberalisation of the EU energy market, which is necessary for understanding the reasons for the creation of relevant GSs. Section 1.2.B presents arguments of the parties during the infringement procedure – to reveal any potential for obstructionism in relation to the GSs and subsequent non-compliance. Section 1.2.C analyses the pre-judgment compliance measure and assesses further compliance obligations stemming from the judgment on case C-174/04. Section 1.2.D analyses efficiency of Italy's compliance in the light of infringement proceedings for non-compliance with the original judgment and concludes that the core enforcement effectiveness/obstructionist hypothesis of this study is supported in this case.

1.2.A: Electricity Market and 'anti-EdF' Law

Eliminating obstacles to the free market in the energy sector has been a challenging task, as energy production and distribution has been a sensitive issue in Europe since World War II (Johnston 1999; Cameron 2007). Traditionally public service providers in network utilities, such as gas and electricity industries, were state monopolies which operated exclusively on the territories of the respective MSs (Cameron 2007: 4-6). This situation has changed significantly during liberalisation via the EU Energy Directives.¹⁰³ Markets opened to different extents however, as some MSs, including Italy, went beyond the minimum requirements and opened up to a greater extent (Scarsi 2001). France remained one of the most closed markets, liberalising to the minimum requirement and at the slower pace while enjoying considerable market power and dominant position of state-controlled near monopoly '*Electricité de France*' or *EdF* became a leading energy exporter within the EU (Bonardi 2004: 102; Maclean *et al* 2007: 539; Clifton *et al* 2010: 1003). This asymmetry in market openness indicates that *EdF* enjoyed a competitive advantage over more opened newly privatised companies in other MSs, such as Italy.¹⁰⁴

¹⁰³ Directive 96/92/EC replaced by Directive 2003/54/EC concerning common rules for the internal market in electricity OJ 1997 L27 (Electricity Directive); Directive 98/30/EC replaced by Directive 2003/55/EC concerning common rules for the internal market in natural gas and electricity OJ 1998 L204 (Energy Directive).

¹⁰⁴ See e.g., OXERA Report (2005), *supra* note 20, p.28; *Financial Times* (4/12/2001) *Financial Times* (24/05/2001).

Naturally, the former could not be acquired by the latter and also remaining protected from theoretical energy exports from Italy. Since France became the largest exporter of electricity to Italy, *EdF* could also take advantage from this dominant position and penetrate the Italian market.

To balance-up this asymmetry, the Energy Directive encompassed a reciprocity clause¹⁰⁵ which assisted MSs to establish competitive electricity market and ensure that relevant companies would operate in accordance with the principles of the free market. This clause allowed MSs to refuse energy imports to its eligible customers in cases where corresponding (same/similar) customers would not be considered as eligible in the exporting MS. The Energy Directive also empowered the MSs to employ ‘appropriate and efficient mechanisms for regulation, control and transparency so as to avoid any abuse of a dominant position, in particular to the detriment of consumers, and any predatory behaviour.’¹⁰⁶ Pursuant to these provisions, some more opened energy markets sought to balance out the existing asymmetry and implemented additional safeguards to protect themselves from the dominant position of *EdF*, which was renowned for its predatory behaviour.

On 22 May 2001, *EdF* disclosed its 20% shareholding in a newly privatised company *Montedison* – the second largest electricity company in Italy. At that time, Italy had been on the way towards electing a new government, so the outgoing government led by Giuliano D’Amato had rapidly responded to this potential takeover threat: a mere three days following *EdF*’s announcement, it relied on provisions of the Energy Directive and implemented GS Law No.192/2001¹⁰⁷ entitled ‘Urgent provisions to ensure the liberalisation and privatisation of specific public service sectors’. This urgent protectionist measure, commonly referred to as ‘anti-*EdF*’ Law, limited the foreign state-controlled monopolies’ rights to access the Italian market. The law established a 2% voting right ceiling for shares held in electricity and gas companies if these shares were to be held by a (non-listed) state-controlled company that is dominant in its domestic market; the voting rights of any such shareholdings exceeding 2% of total share capital would be automatically suspended.¹⁰⁸ This voting right ceiling applied to all acquisitions made after 24 of

¹⁰⁵ Article 3(1) and Article 19(5) Electricity Directive, *supra* note 103.

¹⁰⁶ *Ibid* Article 22.

¹⁰⁷ Decree-Law No.192 (*GURI* No.120 of 25/05/2001) converted into Law No.301 of 20/07/2001 (*GURI* No.170 of 24/07/2001).

¹⁰⁸ Decree-Law No.192, *op. cit.*, Article 1(2).

March 2001,¹⁰⁹ so *EdF*'s shareholding of 20% became non-controlling and now carried only 2% of the voting rights in *Montedison*. Provisions of Law No.192/2001 had to remain in force until the EU market is 'wholly open to competition in the electricity and gas sectors'.¹¹⁰

As *EdF*'s takeover plans have been restrained by Law No.192/2001 it pursued its ambitions via back doors by creating a special joint venture company named *Italenergia* and controlled by *FIAT*, so the owners of *Italenergia* were mostly of Italian 'origin' (European Commission IP/01/1229). Following *Italenergia*'s hostile bid for *Montedison* the Italian government, now led by Mario Monti, has complained to the EU Commission emphasising that this 'predatory behaviour' stems from *EdF*'s dominant market position and represents an abuse of the national electricity market (Cameron 2007: 259). When authorising¹¹¹ the said takeover the Commission noted that *EdF* would take *de facto* or *de jure* control over *Montedison* via *Italenergia* if Law No.192/2001 is found incompatible with the Treaty (European Commission IP/01/1229). *EdF*'s takeover strategy of *Montedison* and the following judgment on GS's could be seen as a joint venture of the Commission and the French company on the way to promoting competition and free movement of capital in European energy markets. *EdF* has made its move, now it was up to the Commission to proceed with the infringement procedure.

1.2.B: Judicial Proceedings

On 23 October 2002 the Commission has notified Italy of the alleged Treaty violation, asking it to submit observations and setting a two month period for reply.¹¹² On 12 March 2003 the Italian government has responded, acknowledging that the 2% voting right ceiling constitutes a restriction, and submitting that it is the only measure which could guarantee fair competition in the energy market and protect Italian companies from anti-competitive attacks. On 11 July 2003 the Commission issued its reasoned opinion, allocating two months for compliance. The two month period lapsed with no response from Berlusconi's government, so the matter got referred to the Court. Even though the Italian government agreed that Law No.192/2001 constitutes a restriction, during judicial proceedings it has eagerly

¹⁰⁹ Decree-Law No.192, Article 1(3).

¹¹⁰ *Ibid*, Article 1(1).

¹¹¹ European Commission (Case COMP/M.2532), Non-opposition to a notified concentration *FIAT/Italenergia/MontEdison*, (2001/C 284/07), 10/10/2001, *OJ C* 284/22.

¹¹² European Commission (IP/02/1489).

defended ‘anti-*EdF*’ Law, arguing that the measures in question are in fact supporting the liberalisation of EU’s energy markets and due to the existing asymmetry in the market openness, it is also the responsibility of the MSs to balance out this competitive asymmetry.¹¹³ The Italian government argued that Law No.192/2001 is the only measure available for safeguarding the national energy market from abusive anti-competitive behaviour of foreign public companies which enjoy a competitive advantage by virtue of their national legislation.¹¹⁴ However, the factual circumstances which triggered the implementation of Law No.192/2001 reveal more pragmatic protectionist motives, as the outgoing government merely sought to restrict *EdF* from taking over *Montedison*. What appears to be of particular significance is that the Italian government willingly opted to sell off its shares in energy companies to boost revenues and now is accusing other MSs’ governments for retaining their stakes in national energy markets.

Italy also claimed that Law No.192/2001 is not discriminatory since it also applies to Italian public companies.¹¹⁵ In this regard, the European advocate rightfully noted that the fact that dominant state-controlled companies which are not listed on a stock exchange do not exist in Italy; this makes Law No.192/2001 only applicable to companies from other MSs.¹¹⁶ What is clear is that by inserting such distinction on ‘eligible’ companies, Italian legislators effectively excluded national companies from application of Law No.192/2001 without imposing clearly discriminatory provisions. The Italian authorities have also argued that Law No.192/2001 is limited by time, as it would cease after the EU energy market is fully open to competition. The Commission dismissed all these defensive arguments, emphasising that it is not the MSs’ responsibility to implement unilateral legislative measures directed to ensure the proper functioning of market while violating the Treaty freedoms.¹¹⁷ To this extent Law No.192/2001, which allegedly aimed at remedying the existing asymmetry in fact represented a hindrance to a free market.¹¹⁸

Italy failed to justify Law No.192/2001 on the grounds of any overriding

¹¹³ Case C-174/04 *Italy*, note 19, para.18.

¹¹⁴ *Ibid*, para.19&36.

¹¹⁵ *Ibid*, para.14.

¹¹⁶ Advocate General (2005) Opinion of the AG Kokott delivered on 3/03/2005 on Case C-174/04 *Commission v Italy* [2005], para.31.

¹¹⁷ Case C-174/04 *Italy*, note 19, para.24.

¹¹⁸ *Ibid*, para.24.

reasons in the general public interest, merely stating that the law is necessary to safeguard the supply of energy within national territory but without providing any explanations how and why restricting shareholdings held by state-controlled unlisted companies to 2% of voting rights would safeguard such supply.¹¹⁹ Therefore, the GS law at issue aimed merely at hindering the access to Italian energy market, but not at pursuing the high goals of European integration.¹²⁰ In absence of justifications on 2 June 2005 the CJEU has ruled that by maintaining in force provisions of Law No.192/2001 Italy has failed to fulfil its obligations under the Treaty provisions on free movements of capital.

1.2.C: Obligation to Comply

In this case the short insight into the correspondence between the parties reveals the Italian government's push towards obstructionist non-compliance. Firstly, Berlusconi's government has negated the two month deadline allocated for reply by the Commission's formal letter – actually replying three months later. Secondly, Italy had extra two months before the Commission issued its reasoned opinion and then it was given another two extra months to comply. At this stage of proceedings the time available for compliance on its own initiative amounted to nine months in total. From the issue of formal letter until referral to the CJEU, the government had more than eighteen months to comply in good faith. However there was not any inclination to do so. Italy's conduct during the infringement procedure reveals that it was determined to resist compliance which points towards the obstructionist character of the 'anti-EdF' Law.

Above all, the Italian authorities have been aware of the Commission's attitude towards this particular 'anti-EdF' Law ever since the clearance of the takeover of *Montedison*.¹²¹ Nevertheless, from the moment of its implementation until the judgment 'anti-EdF' Law which evolved as an urgent protectionist reaction to the hostile bid from *EdF* for *Montedison*, it was successfully fulfilling its purpose for more than four years restricted the French monopoly's rights to take control of an Italian energy company. Two months following the judgment, the Commission has authorised *EdF* (jointly with *AEM*) to acquire *Montedison*,¹²² expressing its

¹¹⁹ Case C-174/04 *Italy*, note 19, para.39-40.

¹²⁰ *Ibid*, para.24.

¹²¹ Case COMP/M.2532, *supra* note 111.

¹²² European Commission Decision (12/08/2005) Case No.COMP/M.3729 - *EDF/AEM/EDISON*, SG-Greffe(2005)D/204452/53, OJ L 24, 29/1/2004.

expectations that the overruled Law No.192/2001 shall soon be removed and replaced by new Law No.81/2005,¹²³ entitled ‘Urgent measures on investments in companies which operate in electricity and gas markets’. The following Section 1.2.D evaluates the sufficiency of this compliance measure, revealing that *EdF*’s ambitions have been restrained once again.

1.2.D: Compliance v Non-compliance

The Law No.81/2005 came into force one month prior to the judgment so, *prima facie*, it could be seen as a timely compliance in good faith. However as the supporting hypothesis on effectiveness of minimalist compliance (H1a) suggests, any amendment to GSs could be minimalist and inadequate. The question remains: Was the compliance ‘by amendment’ effective in the current case? As hypothesised, the ultimate compliance would involve removing the 2% voting ceiling altogether by repealing the Law No.192/2001. However, Berlusconi’s government had amended the ‘anti-*EdF*’ Law, and as the supporting hypothesis on effectiveness of minimalist compliance (H1a) suggests, amendment of the GSs which are of clearly a protectionist nature is a challenging task. If the amendments are insufficient, Italy would be seen as resorting to obstructionist non-compliance, acting in bad faith and contrary to the obligation of sincere cooperation. Such compliance conduct would support the core enforcement effectiveness/obstructionist hypothesis of this study (H1) undermining effectiveness of the enforcement action under Article 258 TFEU. Ultimately, only compliance *per se* is important, so any inefficient compliance initiatives are of little relevance.

Prior to the amendment, Law No.192/2001 comprised of four paragraphs, and basically, the Law No.81/2005 introduced an additional sub-paragraph – a new feature to already existing provisions. This sub-paragraph declared that the 2% voting rights ceiling would not apply to state-controlled companies from other MSs which are holding a dominant position in their domestic markets; in cases when the competent authorities of the MSs concerned have applied standards and guidelines defining and initiating a procedure for privatisation of such companies. According to the Law No.81/2005, a procedure for privatisation could include such measures as listing on a regulated stock exchange or other procedures which would have been

¹²³ Decree-Law No.81 of 14/05/2005 (*GURI* No.111 of 14/05/2005) converted into Law No.131 of 13/07/2005 (*GURI* No.161 of 13/07/2005), text in Italian available at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2005;81> (last accessed on 24/09/2014).

defined in agreement with the Italian government and aimed at ensuring the security of the energy supply, opening of the energy market and promotion of the effective exercise of freedoms guaranteed by the Treaty on access to the energy markets. Basically, the new sub-paragraph refers to the companies from other MSs which are actively moving towards their privatisation, essentially referring to the governments which have committed to open up their energy markets. Therefore, the new so-called ‘liberalisation-commitment’ sub-paragraph of Law No.81/2005 does not cover state-controlled unlisted companies, hindering the access for such companies into the Italian energy market by imposing a 2% voting ceiling, so once more targeting *EdF*. It is clear that the amendments of Law No.81/2005 are insufficient to comply with the judgment, revealing that Italy has knowingly resorted to non-compliance, acting in bad faith and contrary to the sincere cooperation principle.

On 18 October 2005, four months following the judgment, the Commission has officially reminded Italy of its compliance obligations by issuing a formal letter under the enforcement action pursuant to Article 260 TFEU (European Commission IP/06/439). Six months later there was still no compliance and on 4 April 2006 the Commission issued a reasoned opinion, allocating two months for compliance (European Commission IP/06/439). At that time Berlusconi’s government gave way to the new government. On 1 August 2006 the new government, led by Romano Prodi, had abolished both Law No.192/2001 and Law No.81/2005, fully complying with the judgment by the most reliable method – repealing the GSs altogether (European Commission IP/06/1366). Italy complied fourteen months following the judgment and it took one unsuccessful amendment and a penalty procedure to force it into compliance. In the present case, when approaching its compliance obligation, Italy seems to repeat the strategy adopted in the earlier case C-58/99 by initially choosing to amend GSs prior to the judgment. In the present case and in case on GSs of *TI* and *ENI*, initial compliance ‘by amendment’ proved to be minimalist and ineffective, therefore approving the supporting hypothesis on effectiveness of minimalist compliance (H1a). In order to guarantee effective compliance the Commission has applied the last enforcement instrument available to it – Article 260 TFEU. This fact signifies that the first round enforcement action has been ineffective and GSs have been of obstructionist character, supporting the core enforcement effectiveness hypothesis of this study (H1).

The ‘anti-*EdF*’ Law has been fully repealed fourteen months later following

the initial judgment, and only as a result of the enforcement action under Article 260 TFEU. The final compliance ‘by repeal’ has been achieved only after the second round enforcement action progressed to advanced stage of the reasoned opinion, so that second referral and associated penalties became an imminent threat. Such considerable and unnecessary delay in compliance also undermines effectiveness of the infringement proceedings under Article 260 TFEU, thus confirming the second enforcement effectiveness hypothesis (H2). Such procrastinated compliance could not qualify as compliance in good faith. Despite the fact that in case C-174/04 the GSs were eventually repealed, this is the only Italian GSs case which ended up in compliance. From this point onwards this study shall return to the first Italian GS case C-58/99 and its obstructionist enabling Law No.474/1994 in light of CJEU’s preliminary ruling in *Federconsumatori* and another condemning judgment on GSs in case C-326/07.

1.3. *Federconsumatori*: re-appearance of Privatisation Law of 1994

This sub-chapter analyses the CJEU's preliminary ruling in *Federconsumatori*¹²⁴ on GSs stemming from Law No.474/1994, which featured in the first case on GSs in Italian companies *TI* and *ENI*. The GSs in *Federconsumatori* were introduced via companies' statutes and concerned directors' appointments to the board. This case is remarkable for its interpretation of the Treaty provisions on free movement of capital. Here the CJEU confirmed that even if special rights are granted to the state pursuant to a normal application of company law it does not preclude the application of Treaty provisions on free movement of capital. Here the analysis proceeds as following: Section 1.3.A gives a short background summary in order to gain understanding on the reasons behind GSs, Section 1.3.B analyses GSs in light of judicial proceedings and Section 1.3.C comments on post-adjudicative developments, revealing the continuous existence of protectionist features of Law No.474/1994 in statutes of the concerned company. This section is set to reveal how the government addressed the CJEU's preliminary judgment in order to circumvent relinquishing of powers in the relevant company. The concluding analysis of *Federconsumatori* supports the hypothesis on obstructionist nature of Law No.474/1994 and its amendments. It also reveals the Italian government's obstructionist protectionism which could not be overcome by the third ruling of the CJEU on Italian GSs. This section also prepares the foundation for further examination of obstructionist characteristics of Law No.474/1994 in the last Italian GS case C-326/07 (*ENEL*).

1.3.A: Special Appointment of Directors

As in the first case on GSs in *TI* and *ENI*, the story in *Federconsumatori* begins with privatisation. The City of Milan (*Comune di Milano*) established its public service company – *AEM*, which distributed gas and electricity for that municipality. In 1996 *AEM* became a joint-stock company managed by the City of Milan, and several years later the Italian authorities decided to dispose of the majority of their shareholdings, selling 49% of the company's shares.¹²⁵ Since then *AEM* has developed into one of the biggest public service companies in Italy and

¹²⁴ *Federconsumatori*, note 16.

¹²⁵ Advocate General (2007) Opinion of the AG Maduro in Joined Cases C-463/04 and C-464/04 *Federconsumatori v Comune di Milano*, delivered on 7/09/2006, ECR I-10422, para.2.

became the sole supplier of electricity for Milan.¹²⁶ Further privatisation plans involved further disposals of shareholdings. In 2004 *Comune di Milano* further privatised 17.6% of its stakes in *AEM*. However the municipality made this sale conditional by choosing to employ protectionist features of Law No.474/1994: prior to privatisation, corporate statutes of *AEM* had to be amended and special provisions were inserted.¹²⁷

Following privatisation *Comune di Milano* remained a relative majority shareholder, retaining 33.4% of *AEM*'s shares. Interestingly enough, *AEM* has featured in the previous case-law analysis of sub-chapter 1.2 as a company that jointly with *EdF* has acquired *Montedison* in 2005. This fact points towards the magnitude of the above privatisation transactions and their importance for the Italian state. The stakes were high, the sector was sensitive and asymmetry in the market openness existed, so in the view of *Comune di Milano* the Italian state sought to create sufficient protection and to allow significant control over *AEM*, which would be stable and preferably permanent. This is when and why the municipal council of Milan enabled the implementation of protectionist measures into company's statutes pursuant to provisions of the Law No.474/1994 under GSs provisions in company's statutes and the Italian Civil Code.

On 29 April 2004, in accordance with aforementioned decision, *AEM*'s shareholders amended its company's statutes and two special provisions on the appointment of directors to the board have been inserted.¹²⁸ The first provision was based on Article 2449 of the Italian Civil Code¹²⁹ – it allowed the company's statutes to confer onto the shareholder-state the right to appoint any number of directors or auditors or members of the supervisory board. The law does not limit the total amount of directors which could be appointed. Pursuant to this provision, *AEM*'s corporate statutes granted *Comune di Milano* with the right to appoint directors in proportion to its shareholding.¹³⁰ The correlation between the appointment rights and the amount of the state shareholdings aimed at specifically serving the situation established in the case of *AEM*: since *Comune di Milano* held 33.4% shares, it was authorised to directly appoint up to one quarter of the members

¹²⁶ from *AEM* (now *A2A*) official web site.

¹²⁷ Advocate General (2007), *op. cit.*, at para.3.

¹²⁸ *Federconsumatori*, note 16, para.9.

¹²⁹ *Ibid*, para.3.

¹³⁰ *Ibid*, para.9.

of the Board of Directors.¹³¹ This deliberate restraint of appointment rights could point towards the Italian government's intention to justify the measures of Art 2449 of the Civil Code. Pursuant to the Civil Code, the government's appointees had the same rights and duties as other directors but could only be removed by the same bodies that appointed them. The Code also stipulated that provisions of *special laws* shall prevail. The second provision on a directors appointments has been implemented into *AEM's* corporate statutes pursuant to such *special Law* No.474/1994,¹³² which has been overruled back in 2000 in case C-58/99.

In *Federconsumatori* the enabling Law No.474/1994 appears in a new format: it has been recast by amendment of Law No.350/2003¹³³ but its core features remained unchanged, allowing implementation of GSs into company's statutes and granting the government special rights.¹³⁴ Pursuant to Law No.474/1994, there were several special rights available at the state's disposal, however the government chose to employ solely the provisions of Article 2(1)(d) Law No.474/1994, introducing into *AEM's* corporate statutes the special right to appoint a director without voting rights.¹³⁵ This special appointment was governed by Article 4(1) of Law No.474/1994 which amended Law No.474/1994 and established that if the rights of shareholders are limited by company's statutes, the company in question shall adopt in its statutes a special provision to the effect that directors shall be appointed on the basis of a *list system*.¹³⁶ Simply put, in case of exercise of the right of a director appointment pursuant to Article 2(1)(d) Law No.474/1994 company directors shall be appointed pursuant to a minority list system of Article 4(1) of Law No.474/1994. For as long as company's statutes contain provisions implemented pursuant to Article 2(1)(d) Law No.474/1994 the *list system* provision introduced under Article 4(1) cannot be amended or removed by the shareholders.

Pursuant to the provision of a *list system*, a minimum of one fifth of the supervisory board members not directly appointed pursuant to Article 2(1)(d) of Law No.474/1994 shall be appointed from minority lists.¹³⁷ To summarise: the *AEM's* corporate statutes conferred on *Comune di Milano* not only to directly

¹³¹ *Federconsumatori*, note 16, para.9.

¹³² Decree-Law No.332 of 31/05/1994, converted into Law No.474 of 30/07/1994, *supra* note 76.

¹³³ Law No.350 of 24/12/2003, *supra* note 95.

¹³⁴ *Federconsumatori*, note 16, para.4.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, para.5.

¹³⁷ *Ibid.*

appoint up to one quarter of the members of the supervisory board, but also to choose candidates for the position of a non-voting director. The joint effect of the special provisions on directors' appointments enabled *Comune di Milano* to hold the majority of all appointments to the supervisory board.¹³⁸ This majority of appointments would not correlate with *Comune di Milano*'s 33.4% stake in *AEM*, however this shareholding means that *Comune di Milano* basically controlled the company and this control could remain absolute, as 'their' directors could outvote any proposed amendments to the company's statutes.¹³⁹

1.3.B: Findings of the Court

Private shareholders of *AEM* have complained to the Italian national court, claiming that the special appointment provisions discourage investors from purchasing shares, since their investment could not guarantee control of the company.¹⁴⁰ The applicants argued that this situation had a negative effect on the value of their own shareholdings.¹⁴¹ The national court referred the matter for a preliminary ruling to the CJEU which examined the national provisions at issue. The CJEU analysed whether Article 63 TFEU on fundamental freedom of capital movement must be interpreted¹⁴² as precluding the joint effect of provisions which enable the government to obtain control, disproportionate to its shareholdings. *Comune di Milano* took the view that the Treaty provision on freedom of capital movement is irrelevant as directors are appointed according to the corporate statutes and not due to specific legislation, also emphasising that provision of the Article 2449 of the Civil Code is voluntary and applied at the shareholders' discretion.¹⁴³

In this matter the CJEU noted the fact that the rights of appointment of directors are based on a provision of private law and this does not preclude the application of Article 63 TFEU.¹⁴⁴ The CJEU had further established that direct appointments pursuant to Article 2449 of the Italian Civil Code, enabled the government to participate to a greater extent in the control of *AEM* than its status as a shareholder would normally allow.¹⁴⁵ The CJEU also pointed out that provision of

¹³⁸ *Federconsumatori*, note 16, para.10.

¹³⁹ Advocate General (2007), *supra* note 125, para.10.

¹⁴⁰ *Federconsumatori*, note 16, para.11.

¹⁴¹ *Ibid.*

¹⁴² Pursuant to Article 267 TFEU the CJEU can give preliminary rulings interpreting the Treaties.

¹⁴³ *Federconsumatori*, note 16, para.30.

¹⁴⁴ *Ibid*, para.32.

¹⁴⁵ *Ibid*, paras.23&24.

the Civil Code derogates from normal operation of company law, granting the appointment rights only for the shareholder-state, and potential investors would be unable to remove the special provisions from *AEM*'s corporate statutes for as long as *Comune di Milano* retained its relative majority shareholding.¹⁴⁶ These special provisions could not be justified as they were not subject to any conditions.¹⁴⁷ Therefore, on 6 December 2007, the CJEU established that: Article 63 TFEU must be interpreted as precluding a national provision, such as Article 2449 of the Italian Civil Code, under which the Articles of Association of a company limited by shares may confer on the State or a public body with a shareholding in that company the power to appoint directly one or more directors which, on its own or in conjunction with a provision such as Article 4 of Law No.474/1994, which grants the national authorities the right to participate in the election on the basis of lists of the directors it has not appointed directly, is such as to enable that State or public body to obtain a power of control which is disproportionate to its shareholding in that company.¹⁴⁸

1.3.C: The Ruling Addressed

While the CJEU has been busy interpreting Article 63 TFEU, the Italian government and *Comune di Milano* had been searching and developing new ways to pursue its 'business as usual' and retain control over *AEM*. Since the state shareholdings have been gradually reduced due to privatisation to a relative majority, *Comune di Milano* sought to increase its stake in the company. The solution came in the manner of a merger. *AEM* decided to merge with two other public utility companies: *AMSA* (Milan's Environmental Services Company) and gas and energy company *ASM* (Municipal Services Company) which was previously owed by the Municipality of Brescia.

On 4 June 2007, *Comune di Milano* and the Municipality of Brescia (which owned one of the two companies) signed an agreement relating to the guidelines for the merger for both directors' boards.¹⁴⁹ The company's merger led to a merger of powers of Municipalities in their battle against giving-up of their protectionist control over companies which operated in the public service sector. After the merger, a new joint-stock company was created – *A2A* – in which the Municipality of Brescia and *Comune di Milano* held 27.456% and 27.455% of share capital

¹⁴⁶ *Federconsumatori*, note 16, paras.31&37.

¹⁴⁷ *Ibid*, para.42.

¹⁴⁸ *Ibid*, para.44.

¹⁴⁹ See *AEM*'s (*A2A*) official web site.

respectively.

Yet again, the new corporate statutes of A2A contained special arrangements which granted special rights to the said Municipalities. These special rights are based (no surprise here) on protectionist Law No.474/1994, as amended by Law No.474/1994, and by Law No.350/2003. The special rights granted an array of wide-ranging special rights to the said Municipalities.¹⁵⁰ For example, Article 9(1) of A2A's statutes imposes a limit on shares that could be held by any shareholder other than the Municipality of Brescia and the Municipality of Milan. This Article establishes an ownership ceiling at 5%.¹⁵¹ Article 9(9) of the corporate statutes in turn provides that the voting rights of any shareholdings exceeding 5% of total company's share capital may not be exercised. Pursuant to Article 15(3) of A2A's statutes, the two Municipalities have the special right to jointly veto the dissolution of the company, its restructuring, and transfer of the businesses and relocation of its registered office abroad as well as changes in its corporate purposes. Article 15(3) grants the Municipalities with the right to veto any amendments or abolition of A2A's statutes. It must be noted here that the two Municipalities were now jointly holding above 50% of share capital in A2A, which would be giving economic control over the company to them even under normal operation of company law – in contrast to ownership situations such as of *TI*. But should the Municipalities decide to re-privatise some of their shares in the future – this Pandora's box would be open again.

At the time of writing, special rights are present in corporate statutes of former SOEs such as A2A, *ENI* and *TI* which it indicates that the battle over GSs implemented pursuant to obstructionist Law No.474/1994 continues. Previous amendments of Law No.488/1999 and DPCM/2000 failed to provide sufficient level of legal certainty for the GSs of Law No.474/1994 and are neither mentioned in *Federconsumatori*, nor in the relevant companies' statutes. This further supports the assumption of insufficiency of these compliance provisions.

The following paragraphs will review the last bastion of enabling GS Law No.474/1994 and its amendments.

¹⁵⁰ Article 9(1) and (7) and (9); Article 14(2); 15(3) of A2A's corporate by-laws of 14/07/2011, available from A2A official web site at: <http://www.a2a.eu>.

¹⁵¹ Article 9(1) of A2A's corporate by-laws, p.4.

1.4. Privatisation Law of 1994— a Final Challenge?

This sub-chapter further examines Italy's resistance to repeal GSs implemented pursuant to Law No.474/1994¹⁵² and its pull towards obstructionist non-compliance in course of proceedings in case C-326/07. The analysis commences with insight into a non-compliance situation which established following the first judgment on case C-58/99, followed by the comparative analysis of compliance measures. Section 1.4.A supports the findings of the first sub-chapter: the compliance initiative in the first GS case C-58/99 was insufficient and inadequate. Section 1.4.B in turn examines the two stages of infringement proceedings. Prior to the examination of judicial proceedings, a short introduction on two companies further protected by GSs will be presented. Italian compliance conduct is analysed in Section 1.4.C revealing whether the government's compliance strategy actually addressed the CJEU ruling on case C-326/07 in good faith or whether GSs have retained their protectionist powers post-judgment and whether Law No.474/1994 remains an obstructionist piece of national protectionist legislation regardless of the third judgment of the CJEU associated with it. This analysis will support the core enforcement effectiveness/obstructionist hypothesis of this study.

1.4.A: Amendments: Obstructionist and Insufficient

As discussed in section 1.1 of this study, for the first time GSs implemented pursuant to enabling Law of 1994 have been overruled back in 2000 in case C-58/99. Prior to the judgment the measures have been amended by Law No.488/1999 and the criterion for exercise of special rights has been set in DPCM/2000. The initial analysis revealed that these compliance measures were insufficient, making the Law No.474/1994 an obstructionist piece of national protectionist legislation. As these amendments were not ending the initial infringement, on the 5 February 2003 the Commission initiated second action under what is now Article 258 TFEU and a new action under what is now Article 260 TFEU by issuing two formal letters accordingly and allocating two months for compliance (European Commission IP/03/177). The first letter related to the amendments set in Law No.488/1999 and justification criteria set in DPCM/2000 while the second letter related to the

¹⁵² Decree-Law No.332 of 31/05/1994 as amended, *supra* note 76.

discriminatory provision on eligible professionals of Article 1(5) of Law No.474/1994.

Interestingly enough the infringement procedure on compliance with the judgment has been divided into two separate judicial proceedings: firstly on GSs and secondly on discriminatory provision. This procedural division signifies that the initial Italian ‘compliance’ strategy is functioning as predicted in the previous analysis: the judgment would seem to be addressed if the government implements compliance measures which amend GSs in question. Even though the compliance initiatives could be subsequently found insufficient and inadequate, initially they could be deemed as adequate compliance measures by the Commission. The inefficiency of amendments to Law No.474/1994 might be of less significance than in case of urgent protectionist ‘anti-*EdF*’ Law No.192/2001 which became the subject of judgment on case C-174/04 (section 1.2 of this study). It could be the case that, since Article 2 of Law No.474/1994 does not infringe the Treaty as such, the subsequent amendments of the way in which the GSs could be exercised are approached in a different manner than the expressly discriminatory provisions of Article 1(5) of Law No.474/1994 or clearly protectionist provisions of urgent Law No.192/2001 (featured in case C-174/04). However, in any case it is unclear why the Commission had to wait almost three years before it requested the particulars on compliance measures from the Italian authorities. This regards particularly the discriminatory provision of Article 1(5), since the compliance with this part of the judgment on case C-58/99 would be relatively simple – it had to be repealed.

1.4.B: New Amendments and New Proceedings

Following the formal letter issued under what is now Article 260 TFEU the Italian government informed the Commission that on 1 March 2002¹⁵³ it has repealed the discriminatory provision of Article 1(5) of Law No.474/1994 – almost two years after the judgment. First of all, it is necessary to stress that the compliance measures, simple as they may seem, were not implemented immediately following the judgment – the government led by Berlusconi postponed compliance, supporting the core enforcement effectiveness/obstructionist hypothesis of this study (H1). This implies acting in bad faith towards sincere cooperation obligation and duty to

¹⁵³ Article 25 of Law No.39 of 1/03/2002, ‘Provisions for the fulfilment of obligations deriving from Italy’s membership of the European Community’ (*GU*, No.72 of 26/03/2002), available in Italian at:<http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2002-03-01;39> (last accessed on 24/09/2014).

comply with the binding judgments of the CJEU. Secondly, it is apparent that the Commission initiated further proceedings for non-compliance as it has been unaware of the Italian compliance. The failure to inform the Commission on measures undertaken could also point towards behaviour which is contrary to a sincere cooperation principle. It is sufficient to conclude that even though there could be several signs of ignorance of the loyalty obligation, the discriminatory measure has been removed at last.

As regarding the GS provisions of Article 2 of Law No.474/1994, in June 2003 the government replied to the formal letter with a controversial statement, saying that Law No.488/1999 and DPCM/2000 were in fact *consequences* to the ruling on case C-58/99 (which came three months following the compliance measures).¹⁵⁴ In November 2003 Italy has reassured the Commission that it will implement necessary provisions amending Article 2 of Law No.474/1994 to comply with the judgment by the end of the year.¹⁵⁵ The relevant Law No.350/2003¹⁵⁶ has been promptly implemented on 24 December 2003.

Pursuant to the amendment, the law allowed for the creation of identical special rights as contained in Law No.474/1994¹⁵⁷ with one major exception relating to the director's appointment right. This provision, which featured in *Federconsumatori*, now allowed for the appointment of only one non-voting director. Also previously Law No.474/1994 presented the government with a right to grant express approvals (*ex ante* measure) or a right to oppose acquisitions and shareholders' agreements (*ex post* measure). Following the amendment the right to grant approvals is no longer available, only the right to opposition has remained, which could be seen as a less restrictive *ex post* measure. This amendment signifies that in cases where the government has not exercised its right of opposition the acquisition/shareholders' agreement would be deemed as approved by silence.

Another major modification related to the period allocated for the issue of decisions on opposition of acquisitions or shareholders' agreements. Law No.350/2003 considerably shortened this 'reflection period' – now the government could issue its opposition within ten days (instead of the previous sixty days)

¹⁵⁴ Advocate General (2008) Opinion of the AG Colomer on Case C-326/07 delivered on 6/11/2008, ECR-2009, I-02291, para.15.

¹⁵⁵ Advocate General (2008), *op. cit.*, para.15.

¹⁵⁶ *Supra* note 95.

¹⁵⁷ Opposition of acquisitions and shareholders' agreements, veto strategic decisions and veto amendments of the company's statutes, see Section 1.1 of this study.

following the assessment of the relevant transaction's possibility to jeopardise any vital interests of the state. For this period a stand-by clause would apply, precluding the acquirer from exercising of any non-economic rights. The Law No.350/2003 now expressly provides that both opposition and veto rights could now be appealed within sixty days before the national Court. The rights to oppositions could also be evoked within ten days from the occurrence of a situation in which the need to protect the *overriding public interest* would arise. In this case the exercise of special rights must contain explicit and reasoned reference to the date on which such overriding reasons have occurred. The special right of veto basically remains unchanged apart from the introduction of the new requirement obliging the government to provide reasons for veto imposition, explaining why vetoed decisions could pose a threat to the vital interests of the state.

Pursuant to Law No.350/2003 the government had to issue further decrees, setting the criteria for the exercise of GSs, which in turn means that Law No.350/2003 actually does not comply with the CJEU's judgment by itself as previously stipulated by the Italian authorities, yet it merely establishes a platform for further justifications. The DPCM/2004¹⁵⁸ represented a long-awaited justification, stipulating that special rights could be exercised only 'when justified by important and compelling reasons in the public interest concerning [...] public policy, public security, public health and defence, and shall take the form of measures appropriate and proportionate to the protection of those interests, such as the application of appropriate time limits, without prejudice to observance of the principles of domestic and EU law and, above all, of the principle of non-discrimination.'¹⁵⁹ DPCM/2004 provided that the opposition and veto rights could be exercised in cases which could result in a real and serious risk to: (a) interruption of the minimum national supply of goods and services essential to the public as a whole; (b) continuous performance of obligations vis-à-vis the public as a whole in connection with the supply of public services and to the performance of the duties entrusted to the company in order to serve the public interest; (c) the security of plant and networks in essential public services; (d) national defence, military security, public policy and public security; (e) health emergencies.

In summary, amendments which sought to comply with the judgment on case

¹⁵⁸ DPCM of 10/06/2004, *supra* note 96.

¹⁵⁹ Case C-326/07 *Italy*, note 27, para.7.

C-58/99 include: limitation to directors' appointment rights, introduction of a ten-day 'reflection period' during which an appropriate, proportionate and non-discriminatory *ex ante* opposition or veto (which is also subject to judicial review), could be rationally applied if justified by overriding public interest as established by DPCM/2004. In comparison to initial amendments of 1999 and 2000, the Law No.350/2003 and DPCM/2004 went further in an attempt to limit the discretion of the state. These compliance measures reveal that some level of uncertainty remains since it is not sufficiently clear what entails 'real and serious risk' and when the GSs could be triggered. Both Law No.350/2003 and DPCM/2004 are relied upon as measures for justification for GSs in corporate statutes of *ENI*, *TI* and *AEM*. Since these companies' statutes still rely on Law No.350/2003 and DPCM/2004 on the day of writing it means that these provisions are still in force, confirming their obstructionist character. Yet were they actually sufficient to comply with the judgment on case C-58/99?

It appears that they were deemed insufficient, since on 22 December 2004 the Commission issued another formal letter giving Italy two months for compliance.¹⁶⁰ On 24 May 2005 the newly re-elected government led by Berlusconi has boldly declared that Law No.474/1994 and DPCM/2004 are in fact GSs that are in conformity with the Treaty.¹⁶¹ The Commission issued a reasoned opinion on 18 October 2005, setting yet another two month compliance period.

At the time it had been more than five years since the GSs incorporated into statutes of the two Italian companies *TI* and *ENI* pursuant to Law No.474/1994 were overruled by the CJEU in case C-58/99. It has been one and a half years since the GSs have been incorporated into statutes of *AEM* in a newly amended format of Law No.350/2003 – and one year since the latter provision has been referred to the CJEU for preliminary ruling in *Federconsumatori*. Nevertheless, the special rights of the controversial Law No.474/1994 were yet again introduced into statutes of another two companies: former electricity monopolist and present dominant Italian energy company *ENEL* and *FINMECCANICA* (operating in aerospace and defence). Corporate statutes of both *ENEL* (last edited on 21 May 2012) and *FINMECCANICA* (16 May 2012) mirrored one another and so do those of *ENI* and *TI* on the subject of special rights and their execution.

¹⁶⁰ Case C-326/07 *Italy*, note 27, para.8.

¹⁶¹ Advocate General (2008), *supra* note 154, para.19.

Italy persisted in non-compliance, so the Commission had lodged an application to the CJEU on 13 July 2007. The justifications for GSs of Law No.474/1994 have been put to judicial scrutiny once again – eight years after the first judgment in 2000. Firstly, in its application the Commission has criticised the ‘real and serious risk’ criterion of DPCM/2004 for being general, imprecise and leaving too much leeway for governmental discretion.¹⁶² Secondly, the Commission acknowledged that GSs justified on the basis of the Treaty exceptions or by overriding reasons in public interest could be applied in areas that have not been subject to EU harmonisation law, providing for measures necessary to ensure the protection of the fundamental interests of the state.¹⁶³ Since energy, telecoms and transportation sectors were subject of a number of harmonising directives any further measures at MS level would be seen as more restrictive *per se*.¹⁶⁴

In its defence Italy has challenged the Commission’s analysis and arguments on four points, particularly stating that the Commission has focused on the alleged illegality of the GSs provisions of Law No.474/1994 and not on DPCM/2004 which is subject of the present infringement action, so the alleged unlawfulness of Law No.474/1994 is not covered by the present action and the Commission’s main complaints cannot be upheld.¹⁶⁵ Italy also contended the Commission’s arguments on applicability of harmonising directives by maintaining that ‘there is nothing to stop the MSs from adopting [...] measures creating powers to intervene going even further than the provisions of those directives’.¹⁶⁶ The defendant also maintained that ‘domestic legislation is more suitable than EU legislation for regulating situations presenting a risk to the vital interests of the state, situations that only the state can evaluate correctly and in good time’.¹⁶⁷ The Italian authorities also contended the Commission’s arguments on legal uncertainty of the GSs use, specifying that only when a potentially threatening investor appears the special rights would be applied, and that it is not possible to foresee in advance what and who exactly would qualify as being in possession of a threat to the state.¹⁶⁸

The CJEU held that, contrary to the Italian arguments, the Commission has not

¹⁶² Case C-326/07 *Italy*, note 27, paras.11-12.

¹⁶³ *Ibid*, para.14.

¹⁶⁴ *Ibid*, para.15.

¹⁶⁵ *Ibid*, paras.19-21.

¹⁶⁶ *Ibid*, para.24.

¹⁶⁷ *Ibid*, para.25.

¹⁶⁸ *Ibid*, para.27.

extended the subject-matter of the dispute as it is challenging not the GSs of Law No.474/1994 itself but the criteria for their application as provided by DPCM/2004.¹⁶⁹ Regarding the criteria for GSs application, as laid down by DPCM/2004, the CJEU has ruled that it is general and imprecise: neither the mere statement that the GSs must be exercised in accordance with the Treaty nor the fact that they could be judicially reviewed is enough to make these protectionist laws justified.¹⁷⁰ On 26 March 2009 the Court has established that by adopting DPCM/2004 which defined the criteria for exercise of GSs implemented pursuant to Law No.474/1994, Italy has failed to fulfil its obligations under the Treaty.

1.4.C: Compliance v Non-compliance: From Golden Shares to Golden Rights

Following the judgment the government, now again led by Prime Minister Berlusconi, had to comply as soon as possible. Yet again, this time around the government has adopted a familiar pattern previously applied in complying with other GS cases: firstly by informing the Commission of intention to comply and secondly, by leaving this intention not followed up by necessary actions (European Commission IP/09/1755). On 23 November 2009 the Commission issued a formal letter under procedure of Article 260 TFEU followed by additional formal notice of 22 March 2010.¹⁷¹ On 20 May 2010 Berlusconi has issued DPCM/2010¹⁷² which aimed at addressing the CJEU's judgment. It is necessary to note here that following this compliance measure on 24 June 2010 the Commission has closed the infringement procedure against Italy in a view of implementation of the foresaid measure.¹⁷³ The compliance DPCM/2010 appears to be even more controversial, as it consisted of a sole article that in turn comprised of a single sentence: repealing the provisions of DPCM/2004 which laid down the criteria for exercise of GSs. By eliminating the sole justification of GSs the government has 'complied' with the judgment on case C-326/07 which established that criteria for GSs application laid down in DPCM/2004 are contrary to the Treaty. DPCM/2010 does not justify or eliminate GSs and appears to be a misleading compliance measure which only aims at further procrastination, acting as another smoke screen. The Commission has decided to terminate the proceedings since it considered that Italy has satisfactorily

¹⁶⁹ Case C-326/07 *Italy*, note 27, paras.28-30.

¹⁷⁰ *Ibid*, paras.51-55&63-66&72-73.

¹⁷¹ COM(2011) 588 final, *supra* note 36, p.51.

¹⁷² DPCM of 20/05/2010 (*GURI* No.117 of 21/5/2010).

¹⁷³ SEC(2011) 1093 final, *supra* note 36, p.288.

amended the contested GS law. However it is evident that the above compliance measures are inadequate and after more than a year since the Commission's last call to Italy for compliance there has been no adequate compliance in sight.

Despite the announcement that the infringement procedure on the matter has been closed on 24 June 2010, the Commission issued a reasoned opinion on 16 February 2011: a two month compliance countdown started once again (European Commission IP/11/175). During that time the Italian government has been going through one of the most difficult economic and political crises in its modern history: the European debt crisis. It has been a 'lucky co-incidence' that the need to comply and adopt a new GSs legislation has coincided with some radical changes within the Italian government following Berlusconi's resignation on 12 February 2011. The new technocratic government, which had no partisan figures, has been formed in order to implement urgent austerity measures for strengthening the competitiveness of Italy (The New York Times 13/11/2011). There was a need for severe and urgent measures and the new formally appointed Prime Minister Mario Monti, the former EU Competition Commissioner known for his tough stance on pro-European integration and competition enhancement, was determined to implement such unpopular economic measures before the elections in April 2013. Amendment of GSs provisions would fall within that scope.

On 24 November 2011 the Commission had decided to refer Italy back to the CJEU, however Monti went to reassure that compliance could be introduced in the very near future, so the Commission postponed the execution of this referral by one month (European Commission IP/11/1443). This bouncing around of re-assuring promises to alter overruled GSs and urgings by the Commission to finally comply had to come to an end: either through a second referral or by new measures which had to be introduced by late December 2011/early January 2012.

As seen from the previous sub-chapters Italy is notorious for its procrastination and reluctance to comply with judgments on GSs, so it could be predicted that minimalist and insufficient amendments to GSs could once again reappear in the present case, causing obstructionist non-compliance. Inadequate compliance measures could have been introduced to further defend the protectionist effects of the Law No.474/1994. Yet since the technocratic government was outside of partisan politics its compliance measures would not require popular approval, allowing for implementation of the most restraining amendments to GSs provisions.

On 14 May 2012, four months after the set compliance deadline a new golden share Law No.21/2012¹⁷⁴ entered into force, recasting Law No.474/1994. The long-awaited compliance measure limits the government's discretion and deals exclusively with GSs held in two types of companies: Article 1 covered those operating in defence and national security, and Article 2 covered companies holding strategic assets in energy, transport and telecommunications industries.

From the onset it is apparent that Law No.21/2012 has a wider scope of application since it applies to all companies operating in defence or national security and to all companies that hold strategically-important assets, not only to companies which are subject to privatisation. Law No.21/2012 had to be followed by a set of further decrees covering each type of eligible companies and identifying companies, assets, plants and relationships which could be subject to GSs.

As the following summary of the provisions reveals, the GSs and criteria for their exercise appear to be less generic.

Article 1 of Law No.21/2012 provides that GSs in defence and national security companies could be used in case of a serious threat to the essential interests of defence and security of the state, so the government could: (a) impose conditions on the acquisition by any person, (b) veto resolutions concerning important decisions and (c) oppose share acquisition by any person other than the state when such acquisition would provide an acquirer, with voting rights which could jeopardise the interests of defence and national security. Article 1 of Law No.21/2012 further sets the pre-conditions which have to be assessed in order to evaluate the seriousness of a potential threat to the essential interests, such as: the purpose of the resolution, the strategic assets or businesses subject to the transfer, international interests of the state, protection of the national territory or critical infrastructure. For evaluation the government shall, in accordance with the principles of proportionality and reasonableness, apply a *fit-and-proper test* in light of the buyer's potential influence on society. The government would assess a set of characteristics which would reveal whether the acquirer could adequately carry out the relevant activities in strategic industries and ensure the continuity of supply. It would determine whether acquirer is reliable and has no threatening or risky links

¹⁷⁴ Decree-Law No.21 of 15/03/2012 'Rules on special rights for companies in the defence and national security sector, as well as for the activities of strategic importance in the fields of energy, transport and communications' (GU No.63 16/03/2012), converted into Law No.56 of 11/05/2012 (GU No.111 14/05/2012), available in Italian at: <http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legge:2012-03-15;21!vig> (last accessed on 24/09/2014).

that could undermine the secure delivery of services or jeopardise interests of defence and national security. Article 1 of Law No.21/2012 established an *ex ante* notification regime obliging companies to notify the government within ten days prior to implementation of any relevant resolution or acquisition. The government can exercise its special right within fifteen days following notification and this ‘reflection period’ could be suspended once for a period of ten days.

Article 2 of Law No.21/2012 establishes similar GSs regime covering strategic assets (including companies, plants, assets and relationships) in the energy, transport and communications sectors which are vital to ensure the minimum supply and the continuity of essential public goods and services. Article 2 established an *ex ante* notification regime obliging company holding strategic assets to notify the government within ten days prior to adoption of any strategic resolution or prior to acquisitions of ‘strategic assets’ by companies or residents originating from a non-EU country. Article 2 specifies that the government could veto the resolution or acquisition within fifteen days if it could possess an actual and serious threat to the public interests of safety and operation of networks, services and plants and to continuity of any vital supply of such services. The special rights could be exercised only in an exceptional situation where the public interest relating to the safety and operation of any strategic asset may be materially jeopardised, if it is necessary to ensure the continuity of supply, the maintenance, safety and operation of networks and facilities and the free access to the market and also if such exceptional situation is not addressed by any relevant domestic or European regulation. Article 2 of Law No.21/2012 states that the special rights should be non-discriminatory and exercised solely on the basis of objective criteria. To this end, the government shall consider a similar *fit-and-proper test* of reliability and adequacy as applied in regime established by Article 1 of Law No.21/2012.

Both Articles 1 and 2 of Law No.21/2012 provide that during the fifteen day ‘reflection period’ a stand-by clause applies, suspending any non-economic rights attached to the relevant shareholding. Similarly, in both types of companies, veto and opposition rights could be exercised in the form of imposition of specific conditions sufficient to safeguard essential interests. All non-economic rights shall be suspended if the potential investor does not comply with the said conditions. Both Articles 1 and 2 provide that any relevant resolutions and acquisitions which are not notified to the government are null and void, while the failure to notify will be

subject to an administrative fine. All the notified transactions can be accomplished and non-economic rights exercised after the expiry of the 'reflection period'. In cases of a veto or an opposition the shareholding in question shall be suspended of any non-economic rights and the acquirer must dispose of its shareholdings within one year.

To summarise: the new GSs of Law No.21/2012 seems to be much fitter to adequately address the CJEU's judgments on cases C-58/99 and C-326/07, since it appears to establish a comprehensive, legally certain and precise investment control regime in the strategic sectors. One of the central provisions of the law is the *fit-and-proper test* applied to a potential acquirer. The director's appointment right is no longer available, while obligation of *ex ante* notification to the government and a fifteen day stand-by clause seems to be primarily oriented on extra-EU investors. Provisions that govern GSs in defence and security companies seems to be justifiable, however provisions on strategically-important assets could once again be challenged, since the Law No.21/2012 leaves room for discretion as it does not specify what an 'actual and serious threat' would involve. The above mentioned vagueness could be addressed by the implementation of further decrees which could bring more clarity and legal certainty to these provisions.

The decrees were to be implemented in September (for energy, transport and telecoms) and August (for defence and security) 2012. However, due to the new developments on the Italian political arena, in spite of the technocratic government's promises, it became clear that the necessary decrees would not be implemented in time. On 8 December 2012 Monti had to resign after losing the support of Berlusconi's party, so leaving the GS issue unsettled (BBC News Online 8/12/2012; Financial Times 28/12/2012). Following his resignation, new elections were due on 24-25 February 2013 (BBC News Online 22/12/2012). In the meantime the old GS regime of DPCM/2004 and Law No.350/2003 still applies and the Italian government enjoys special rights in *A2A*, *ENI*, *TI*, *ENEL* and *FINMECCANICA* - companies in which the execution of these rights has been found to be contrary to the Treaty.

The Commission is currently looking at the Law No.21/2012, but with reservation for further decrees, since the new GS regime, as a whole, could only be

evaluated after all legislative measures are implemented.¹⁷⁵ However, as the supporting hypothesis on the effectiveness of minimalist compliance of this study suggests (H1a), amendments to GSs is likely to be insufficient to fully comply, so the complete repeal of GSs of Law No.474/1994 and compliance with both judgments on cases C-55/98 and C-326/07 seems to be once again avoided. This obstinate non-compliance situation proves that Italy has acted in bad faith and contrary to the sincere cooperation principle. In the light of all of the above, the core enforcement effectiveness hypothesis of this study (H1) is confirmed for both cases C-58/99 and C-326/07. Taking the great number of compliance ‘by amendment’ attempts and their subsequent inefficiency and inadequacy, the supporting hypothesis on effectiveness of minimalist compliance (H1a) is also confirmed for both cases. In a similar vein, the fact that the Commission had to initiate enforcement action for non-compliance under Article 260 TFEU for both cases and since ultimate compliance has been (hypothetically) achieved only at the advanced stages of the procedure, the hypothesis on effectiveness of the penalty procedure (H2) is also confirmed.

¹⁷⁵ Here it is sufficient to provide updates on the issue. Following the numerous amendments and repeals the four implementing decrees have finally entered into force in 2014 (DPCM No.108 of 6/06/2014, in force from 15/08/2014; DPCM No.35 of 19/02/2014, in force from 21/03/2014; DPCM No.85 of 25/03/2014 and DPCM No.86 of 25/03/2014 in force from 7/06/2014). These decrees identified the strategic assets in the energy, telecoms and transportation sectors (DPCMs No.85, No.86) and defence sector (DPCMs No.35, No.108) that are subject to the special regime. Special powers reserved for the government have been repealed from corporate by-laws of *ENI* (20/11/2014), *ENEL* (30/07/2014), *A2A* (12/06/2014), *TI* (26/06/2014) and *FINMECCANICA* (25/09/2014). In respect of the latter company, its corporate by-laws provide that the acquirer of stakes in excess of 3-25% thresholds is required to notify the government of acquisition so that the state could exercise its special powers. The new Italian legislation on state’s special powers (see note 174) together with four implementing decrees improves significantly the legal framework. Currently the Commission services are assessing its full compliance with EU law. Following the adoption of the implementing decrees in 2014, the former legislation challenged in the infringement case for non-compliance with the CJEU’s judgment on case C-326/07 is no longer in force. The case is still open pending the comprehensive assessment of the new legislation.

Concluding Analysis and Remarks on Italian Golden Share Cases

As the implementation of urgent GSs of ‘anti-EdF’ Law has demonstrated, the Italian government has proved to be quick to urgently and promptly implement GSs when the necessity arose. However the government was not that willing and prompt on removing the overruled GSs, resorting to non-compliance with the CJEU’s judgments, rendering the enforcement action under Article 258 TFEU ineffective in facilitating prompt compliance. The government has been willing to justify the existing GSs, however some (or most) of these justifications were genuinely vague and inadequate. This in turn has left the possibility of further disputes over the legality of GSs. Over a decade has passed since the first judgment on case C-58/99 and overall there have been three rulings and one referral. Three out of the four cases concerned Law No.474/1994 which has undergone the largest number of amendments, yet the matter of non-compliance still goes on (as of July 2012), pointing towards obstructionist nature of the measures and resulting in action contrary to the sincere cooperation principle and in bad faith. The GSs have been contested in four Italian cases over the period of a decade. As a result, the Commission’s clear-cut position on the GSs coupled with agenda-setting case-law of the CJEU failed to facilitate significant policy shift at the national level. Consequently, Italy’s continuous willingness to employ GSs over the years, confirms the hypothesis on ineffectiveness of the Commission’s and the CJEU’s policy-setting (H3) for all Italian cases.

Analysis of Italian cases revealed that only in one case C-174/04 compliance has been ultimately achieved, yet it cannot qualify as compliance in good faith. Here the government repealed GSs, but only following insufficient compliance attempts, only as reaction to the imminence of referral for non-compliance with the original judgment and only after a considerable delay. The battle over GSs of Law No.474/1994 has been a long-lasting one. Found unlawful back in 2000, amended by measures of 1999 and 2000, in *Federconsumatori* it emerged in a new format following amendments of 2003 and 2004, and subsequently ‘amended’ by Berlusconi in 2010 with no further conditions or justifications for GSs application. The GSs enacted pursuant to enabling Law No.474/1994 have been repeatedly left unjustified which supports the supporting hypothesis on effectiveness of compliance ‘by amendment’ (H1a). Finally, through numerous amendments, the contested GSs seem to come to terms with the Treaty. Along the way to justification from Law

No.474/1994 to Law No.21/2012 lays a large number of political undertakings to comply, blunted by numerous procrastinations and obstructionist non-compliance, and as a result contributing to the establishment of a ‘stalemate’ on compliance between the Commission and Italy. The case of urgent provisions which have been implemented in order to finally comply with case C-174/04 could serve as a good example of how GSs judgments must be addressed – not by amendments, but by full repeal. However, as the enabling Law No.474/1994 itself is not contrary to the Treaty, the government appears to be willing to find a ‘cure’ to flawed GSs instead of striking them off and implementing compliance measures such as Law No.350/2003, DPCM/2004 and DPCM/2010 and Law No.21/2012. Twelve years since their use has been outlawed, the special rights of the state are still very much alive in latest GS Law No.21/2012.

A lack of political will to comply with the judgments and to let go of GSs appears to be balanced out by the excess of political will to lawfully protect strategic industries. The new GSs of Law No.21/2012, which appeared through trial and error, seem to be working in synergy with the Treaty. However, since the law itself remains inactive well past the estimated compliance deadlines and as the political battle continues, it is highly unlikely that further decrees would represent appropriate compliance measures or would be introduced any time soon.¹⁷⁶ After more than a decade full of procrastination and inadequate compliance initiatives, Italy seemed to move away from unjustified *dirigisme* and state control towards justified and predictable regime for regulation of investments in key strategic companies. However grand were the expectations of Monti’s Law, it could all be proved unfruitful once more, since non-compliance persists despite all reassurances. It could be concluded that Italy acted in bad faith when addressing the obligations stemming from the GSs judgments, revealing a significant trend of obstructionist non-compliance.

To summarise: the compliance analysis with the judgments on cases C-58/99, C-326/07 and C-174/04 has revealed that majority of compliance measures proved to be of minimalist character, insufficient and inadequate. This finding confirms the supporting hypotheses on effectiveness of compliance ‘by amendments’ (H1a). Consequently in all three cases issued pursuant to Article 258 TFEU (C-58/99, C-

¹⁷⁶ As the accompanying text to note 175 reveals, further compliance process envisaged several draft decrees while the final implementation of the regime introduced by Law No.21/2012 has been considerably delayed.

326/07 and C-174/04) the Commission had to initiate the second round of infringement proceedings. This fact confirms that the first round enforcement action has proved to be ineffective, which confirms the core effectiveness hypothesis of this study (H1). Likewise, ultimate compliance measures were implemented only at advanced stages of the second enforcement action, which implies that effective compliance with GSs cases could only be achieved if penalties are likely to be applied in the foreseeable future. Therefore, the second effectiveness hypothesis (H2) is confirmed for the three Italian cases ruled under Article 258 TFEU. The latest judgment on Italian GSs (C-326/07) has been issued in 2009, by the time the EU institutions' position on the said protectionist measures has been fully developed and confirmed on a numerous occasions. Italy's desire to retain and justify GSs despite the presence of such clear-cut policy reveals that it has failed to comply with the judgment in a timely and proper manner. Consequently, the hypothesis on ineffectiveness of EU's policy-setting (H3) is confirmed for all four Italian cases. In conclusion it is necessary to emphasise, that the Italian state has made a significant effort to define and limit its GS regime. In case if the Commission's services accept the implementing decrees as satisfactory compliance measures, Italy could be seen as a MS that successfully achieved its goal in justifying state intervention into operation of private companies.

The obstructionist protectionism of Italian cases shall be mirrored in the Spanish cases analysed in the following chapter.

2. Spain: Golden Share Network - Overlaps and Substitutions

Introduction on Spain

Government's control over strategic companies has a lasting history in Spain, dating back to a widespread nationalisation of industries under military dictatorship of Franco. Until Franco's death in 1975, authoritarian governments owned and controlled the majority of strategic industries, putting non-economic goals above corporate policy objectives (Bortolotti, Milella 2006: 9). In order to reduce budgetary deficits (Pardo 2011: 172) the government launched ambitious privatisation in 1989 (Ortega, Sánchez 2001) subsequently making Spain one of the few MSs (alongside the UK) that has fully privatised majority of its key industries. It could be seen as a 'pace-setter' in liberalizing electricity (Clifton *et al* 2010: 1003). However, privatisation was not followed by actual market deregulation as state-owned monopolies became privately-held monopolies and long transition periods allowed key industries to remain under state protection (Pardo 2011: 168, 172). For the most valuable national companies the Spanish government has implemented GSs. While enjoying competitive advantage some Spanish companies actively expanded into international arena, quickly growing into multinationals and 'world-beaters' (Pardo 2011: 172; *The Economist* 6/11/2008; *The Telegraph* 1/10/2006). The Spanish Government has been highly protectionist allowing the usage of different CEMs such as pyramid structures, shareholders agreements and voting right ceilings.¹⁷⁷ Spanish political parties and electorate have eagerly supported EU integration and Spain has greatly benefited from the membership (Pardo 2011: 168; Pardo 2012: 13; Farrell 2010: 167), however over time tensions emerged in the Spanish-EU relations as national interests were no longer defined as reflecting interests of the Union (Farrell 2004: 215, 218).

When it comes to compliance with EU law, Spain could be seen acting in accordance with its reputation of a 'good European' (Farrell 2010: 167) which does not persist in violation and goes to great lengths to avoid referral to the CJEU (Tallberg, Jönsson 2001: 26; Börzel 2001: 811, 820; Börzel *et al* 2010: 4). However, the analysis of this chapter reveals that Spain could intentionally resist complying when it comes to GSs, promptly imposing barriers to the free market when there is

¹⁷⁷ There are in total 7 legally available CEMs that are widely used by the companies, *see* SEC(2007) 268, *supra* note 70, p.19-29&50; *also* RINGE (2010), p.223.

an urgent need to block cross-border acquisitions. Following the condemning judgments GSs were not as promptly repealed as they were introduced and the government resorted to procrastination and non-compliance. In all analysed GSs cases final compliance has only been achieved after deliberate procrastination and inadequate amendments which triggered second referrals for non-compliance with the judgments. As it will be shown, Spain tends to comply only when the GSs in question have served up to their protectionist goals.

2.1. Law No.5/1995: First Spanish Golden Share Case C-463/00

This sub-chapter analyses Spain's compliance with the first GS judgment and is organised as follows: Section 2.1.A discloses GSs, Section 2.1.B analyses compliance conduct during judicial proceedings, followed by Section 2.1.C which assesses compliance obligations. Section 2.1.D concludes with analysis of compliance initiative revealing subsequent implications.

2.1.A: Special Rights

Spain was well on the way to open its markets to full competition. However on 23 March 1995 the Spanish government chose to allow creation of GSs by implementing privatisation Law No.5/1995.¹⁷⁸ The law established a framework for prior administrative approval regime applicable for certain resolutions in companies that provide services of general public interest. The government revealed much about expressly protectionist aims of *ex ante* approval in preamble to the Law No.5/1995, stating that it aims to replace public participation with state-led control in private strategic companies.¹⁷⁹ The government justified such intervention by the necessity to protect security and performance of companies on the grounds of public interest and security. According to the government, the approval regime is fully compliant with the Treaty, does not impair competition and represent a less intrusive protectionist measure since it has an automatic expiry date, could apply only to limited types of resolutions and could be suspended at any time in cases when public interests that sustained it ceased to exist.¹⁸⁰

Pursuant to Law No.5/1995, the said approval regime would apply to privatised companies (and groups of companies) which are controlled by the government and provide essential or public services, engage in activities which are subject to specific administrative review procedures, or their activities are exempt from the rules on competition under the Treaty.¹⁸¹ GSs must be implemented by further company-specific Royal Decrees prior to disposal of government control, granting the government with the special right to approve resolutions relating to

¹⁷⁸ Privatisation Law No. 5/1995 'Legal Regime for Disposal of Public Shareholdings in Certain Undertakings' of 23/03/1995 (*BOE* No.72 of 25/03/1995); implemented by Royal Decree No.1525/1995 of 15/09/1995 (*BOE* No.230 of 26/09/1995).

¹⁷⁹ Law No.5/1995, Preamble, Section (2), *op. cit.*, p.9366.

¹⁸⁰ *Ibid.*

¹⁸¹ Case C-463/00 *Spain*, note 19, para.9.

company's dissolution, merger or de-merger, disposal of strategic assets and change of the company's objectives. The Royal Decrees could also enact approvals for transactions that reduce government's shareholding by 10% and also for share acquisitions, where such acquisitions would result in a holding of at least 10% of the total share capital of a relevant company. The voting rights of any acquisitions in excess of the established 10% ceiling were suspended. Pursuant to the Law No.5/1995, the government has to issue its approval within one month. In case of the absence of express approval any resolutions or acquisitions are null and void. Approval regime could have been modified or withdrawn by implementation of a separate Royal Decree.

Further company-specific Royal Decrees¹⁸² were implemented for the Spanish strategic companies, setting timeframes during which the approval regime should be effective. The table below is a short overview of relevant companies and regimes.

Company	Royal-Decree Nr.	Entry into Force	Effective for	Estimated expiry date
Repsol	3/1996	16 January 1996	10 years	6 February 2006
Telefónica	8/1997	11 January 1997	10 years	18 February 2007
Argentaria	40/1998	16 January 1998	3 years (+1 year extension)	17 January 2001
Tabacalera	552/1998	3 April 1998	8 years	28 April 2006
ENDESA	929/1998	30 May 1998	10 years	8 June 2007
Indra	482/1999	19 January 1999	5 years (+2 year extension)	18 March 2006
Iberia	343/2001	5 April 2001	5 years (+2 year extension)	3 April 2006

Table 1: *Overview of the Companies and Relevant Golden Shares Regimes*

The first company subjected to GSs was *Repsol* – one of the biggest European oil and gas companies. Secondly GSs were implemented for *Telefónica* (e.g. Adell 1997: 206) – at a time one of the most profitable telecommunication companies in Spain. Later, the government introduced GSs for *Endesa* (the biggest electricity producer and national utility company), *Argentaria* (it was a third largest Spanish bank) and *Tabacalera* (the oldest tobacco company in the world and a state tobacco monopoly). Two of the latter companies did not provide services of vital public

¹⁸² Royal Decrees: *Repsol* – No.3 of 15/01/1996 (BOE No.14 of 16 /01/1996); *Telefónica* - No.8 of 10/01/1997 (BOE No.10 of 11/01/1997); *Argentaria* – No. 40 of 16/01/1998 (BOE No.15 of 17/01/1998); *Tabacalera* – No.552 of 2/04/1998 (BOE No.80 of 3/04/1998); *Endesa* – No.929 of 1405/1998 (BOE No.129 of 30/05/1998); *Indra* – No. 482 of 18/03/1999 (BOE No.67 of 19/03/1999); *Iberia* – No.343 of 4/04/2001 (BOE No.82 of 5/04/2001).

interest, however other companies did. GSs in two other companies *Indra* (defence and electronics) and *Iberia* (airline) were implemented at a later stage and were not subject to infringement procedure. The approval regime of Law No.5/1995, in exclusion of two cases, could be justified, yet it represents an *ex ante* mechanism, which is more restrictive than *ex post* measures. To conclude, GSs created pursuant to privatisation law of 1995 applied for a limited period of time, in a limited number of companies, yet they were overly restrictive and imprecise, therefore prompting the Commission to intervene.

2.1.B: Judicial Proceedings and Compliance

The Spanish government has promptly replied to the Commission's formal letter justifying the approval regime and subsequently clarifying its position on compatibility of the measures in supplementary letter from 18 March 1999 (European Commission IP/99/579). The following day Spain implemented another Royal Decree, establishing a five year approval regime for *Indra*. On 2 August 1999 the Commission issued a reasoned opinion allocating two months for compliance. Spain replied with a three-month delay reiterating its previous statements. At the same time the government has been aware that justifying special rights in banking and tobacco companies would be impossible, so it undertook some steps towards compliance.

The government did not address the three year regime of *Argentaria* by simply allowing it to expire, yet it has withdrawn the eight year regime in *Tabacalera* after making several considerable adjustments to the Spanish tobacco market. The government has significantly re-enforced *Tabacalera's* position in the European market by means of new protectionist Tobacco Law¹⁸³ (which allowed it to regulate imports) and a friendly merger with another former state tobacco monopoly originating from 'friendly' MS – France (e.g. *El Pais* 5/10/1999; *El Pais* 23/10/1997). The resulting company *Altadis* has established its seat in Madrid (*El Pais* 6/10/1999), meaning that *Tabacalera* retained its Spanish identity and the government's objectives have been achieved, so that GSs could now be relinquished without any delay. In 2000 the government amended¹⁸⁴ the term for the duration of GSs applicable to *Tabacalera*, also pointing out that one of the reasons behind this move is the introduction of Tobacco Law.

¹⁸³ Law No.13 of 4/05/1998 (*BOE* No.107 of 5/05/1998).

¹⁸⁴ Royal Decree No.67/2000 of 21/01/2000 (*BOE*, No.28, 2/02/2000).

Following an eight-month deliberation the Commission had decided to refer the matter to the Court, lodging an application on 21 December 2000 (European Commission IP/00/715). One month later the GSs in *Argentaria* have expired, and prior to this event the government has strengthened the company's competitiveness via a merger with a larger Spanish bank *BBV* (El Pais 20/10/1999; El Pais 19/05/2002). Even though the GSs of Law No.5/1995 have been put to the CJEU's scrutiny, it did not preclude the government to introduce new such measures in 2001 for *Iberia*.

During the judicial stage Spain has pleaded that the action is inadmissible, basically contending the precision of the Commission's application as GSs in *Argentaria* and *Tabacalera* have expired and the Commission referred to incorrect paragraph of Law No.5/1995 and its provisions.¹⁸⁵ The CJEU dismissed all the above pleas by stating that GSs in *Argentaria* and *Tabacalera* were effective following the two month compliance deadline allocated in reasoned opinion and that it is of no relevance that the Commission did not refer to each particular part of Law No.5/1995 in its application.¹⁸⁶

At the time of the judicial stage of the infringement procedure Spain argued at cross points with the Commission. It argued that GSs are perfectly legal under national law since the government's sole intention was to create supplementary regulatory mechanism which would guarantee that companies in question would continue to deliver their services to the public.¹⁸⁷ Spain also supported its claim on legality of Law No.5/1995 by referring to its preamble which dictates that the law should be applied in line with the Treaty.¹⁸⁸ Above all, the government stressed that since the state could willingly decide on privatisation of the said companies it could also implement measures which limit full application of the Treaty freedoms, since 'that he who can do most can also do least'.¹⁸⁹ Spain maintained that Law No.5/1995 is not discriminatory, is justified by overriding requirements of general public interest and is proportional to the objectives pursued.¹⁹⁰ In the Spanish government's view the discretion left to the national authorities (on deciding when to grant approval) is necessary for effectiveness of the said regime since implementation of

¹⁸⁵ Case C-463/00 *Spain*, note 19, paras.18-20.

¹⁸⁶ *Ibid*, paras.25-28.

¹⁸⁷ *Ibid*, para.39.

¹⁸⁸ *Ibid*, para.40.

¹⁸⁹ *Ibid*, para.41.

¹⁹⁰ *Ibid*, paras.42-45&55.

exhaustive list, prescribing application of the regime, would paralyse administrative action.¹⁹¹

The CJEU dismissed all the defendant's arguments, upholding that GSs in *Argentaria* and *Tabacalera* could not be justified, while GSs in *Repsol*, *Telefónica* and *Endesa* lacked on precision leaving the government with wide margin of discretion.¹⁹² On 13 May 2003, after maintaining that an *ex ante* approval regime 'represents a serious threat to the free movement of capital and may end by negating it completely'¹⁹³ the CJEU ruled that by maintaining in force Law No.5/1995 and company-specific Royal Decrees, Spain has failed to fulfil its obligations under the Treaty.

2.1.C: Obligation to Comply and Compliance Measures

Prior to the judgment on case C-436/00 two GSs regimes have ceased: in *Argentaria* it expired while in *Tabacalera* the expiry date has been amended, so in respect to the two latter cases the government has complied before the judgment. In order to fully comply with the judgment the government had to either amend or withdraw GSs still applicable for *Repsol*, *Endesa* and *Telefónica* since their expiry dates were not in the foreseeable future. Compliance in good faith and in conformity with the sincere cooperation principle would entail withdrawal of overruled GSs as well as of newly introduced regimes in *Indra* and *Iberia*, and not just waiting for these regimes to expire or attempting to justify them by amendments. The government could have applied the express provision for withdrawal of GSs as enshrined in the preamble to the Law No.5/1995, yet the provision implied that GSs could be withdrawn only in cases when public interest that sustained it has ceased to exist, which was not the case in the remaining three companies, as they provided services of public interest, thus the necessity to protect public interest persisted. Telecoms are throughout regulated at the Union level, so there is little room left for GSs in *Telefónica*, yet GSs in energy companies have the potential for being justified. Hence, the government has been attracted to the idea of compliance 'by amendment'.

¹⁹¹ Case C-463/00 *Spain*, note 19, para.46.

¹⁹² *Ibid*, paras.51-80.

¹⁹³ *Ibid*, para.76.

On 30 December 2003 the government adopted Law No.62/2003,¹⁹⁴ amending the original provisions of 1995 privatisation law in a pursuit for justifying overruled GSs. The key changes introduced to the regime are: substitution of *ex ante* approval regime with *ex post* notification regime and further delineation of criteria for its application (El Pais 12/11/2003). According to Law No.62/2003 eligible resolutions and transactions shall be subject to notification to the government, which, within one-month of the ‘reflection period’, shall evaluate the notified decision and may oppose it. If there is no express opposition, the said resolutions shall be deemed approved by silence. The GSs regime would only apply to resolutions which unfold their effects on the Spanish market. During ‘reflection period’ a stand-by clause applies to notified resolutions and acquisitions, suspending their effects and attached voting rights.¹⁹⁵ Any resolution which has not been notified shall not be effective, while resolutions which went through notwithstanding the opposition of the government shall be deemed ineffective.¹⁹⁶

Pursuant to Law No.62/2003 the government may veto notified resolutions only due to existence of significant risks or adverse effects on the activities of the protected companies, in order to ensure their proper management and delivery of services, in accordance with the objective criteria by applying the *fit-and-proper test*. Essentially, the government will assess the potential acquirer’s reliability, transparency and ability to adequately carry out the relevant activities to ensure uninterrupted delivery of services.¹⁹⁷ Law No.62/2003 further provides that in order to ensure the proper management and provision of services by the companies in question the government will take into account the following criteria applicable to relevant products or services: security in the continuity of supply, uninterrupted physical availability on the market at an affordable price and in a manner consistent with environmental protection and sustainable development, protection against the risk of inadequate maintenance of infrastructure, protection of general interest in the relevant sector and ensuring adequate maintenance of policy objectives.¹⁹⁸

Additionally, Law No.62/2003 introduced new company-specific provisions effective from 1 January 2004, each establishing a notification regime and its expiry date for *Repsol* (until 6 February 2006), *Telefónica* (18 February 2007), *Endesa* (8

¹⁹⁴ Law No.62/2003 (BOE No.313 of 31/12/2003) See ANNEX III of this study for translation.

¹⁹⁵ *Ibid*, Article 4(3).

¹⁹⁶ *Ibid*, Article 6.

¹⁹⁷ *Ibid*, Article 5(2) (a)-(e).

¹⁹⁸ Article 5(3) (a)-(c) of Law No.62/2003, *supra* note 194.

June 2007), *Indra* (23 March 2004) and *Iberia* (23 March 2004). These provisions also delineated sector-specific strategic assets which are subject to notification, such as: oil refining and storage facilities for natural gas, equipment used in telecoms, cables and transit stations. Pursuant to the Law No.62/2003, the new regime would apply to the existing Royal Decrees on *Repsol*, *Endesa*, *Telefónica*, *Indra* and *Iberia* which will remain in force. Lastly the Law No.62/2003 established that notification regime will not apply to acquisitions resulting in a holding of at least 10% of the total share capital which are of purely financial nature.

In summary, the government has changed the way in which the special right of opposition/veto could be exercised – through *ex post* notifications which could be seen as less restrictive when compared with the previous *ex ante* approval. Following the amendment, GSs appear to be more legally certain because of introduction of *fit-and-proper test* and also applying only to strategic assets and not to purely financial acquisitions. However, notifications could lead to opposition/veto of transactions and major corporate restructuring decisions (such as M&As) on the grounds of public interest and security of supply. Hence, in the absence of any further provisions increasing the level of legal certainty of the said GSs, the government once again granted itself a wide margin of discretion. This allows drawing a first conclusion: in accordance with the supporting hypothesis on effectiveness of minimalist compliance (H1a), any amendments aimed at justifying the rejected GSs regime are less likely to facilitate full compliance. As a result, implementation of Law No.62/2003 could be seen as compliance in bad faith, which could trigger further sanction threats.

2.1.D: Compliance v Non-compliance

The government allowed *Argentaria*'s regime to remain intact for entirety of the allocated period (by allowing it simply to expire), so it could be seen as disregarding the obligations stemming from the sincere cooperation principle. The Spanish government suspended the validity term of the GSs in another less likely candidate for GSs protection – *Tabacalera*. The protectionist Tobacco Law, which aimed to substitute scrutinised GSs, has been challenged in a number of judicial procedures before the Supreme Tribunal of Spain.¹⁹⁹ The case has been referred to

¹⁹⁹ Supreme Tribunal of Spain (Madrid), Appeal: 387/1999, Judgment of 18/06/2001, *Asociacion Nacional de Expendedoresde Tabacoy Timbre (ANETT)* and *Asociacion Nacionalespanola de Distribucion Automatica (ANEDA)* against Royal Decree 1199/1999 of 9 July, which implements

CJEU for a preliminary ruling. In 2012 the CJEU established that the provisions in question constitute a restriction on trade and are not justified by overriding interest.²⁰⁰ This finding points to one of the bad faith compliance strategies which could be applied by the MS in order to retain national protectionist provisions in place. In case of *Tabacalera* GSs were abrogated only after they have been substituted by similar protectionist measures, which were also incompatible with the Treaty. Acting in such obstructionist manner reveals that Spain acted in bad faith towards compliance obligations and loyalty to the EU principle.

The implementation of GSs for *Indra* and *Iberia* does not point towards good faith behaviour either, since the government should have abstained from introduction of new GSs in light of the infringement procedure on the similar measures. Following the judgment the government attempted to justify GSs by implementing amendments of Law No.62/2003. However, as the supporting hypothesis on effectiveness of minimalist compliance (H1a) suggests, instead of trying to justify the illegal regime the Spanish authorities should have abrogated the overruled GSs altogether.

On 15 July 2004 the Commission issued a formal letter (European Commission IP/04/923) under what is now Article 260 TFEU; a year later followed a reasoned opinion (European Commission IP/05/874). Following the ruling on case C-436/00, GSs in *Indra* ceased to exist. On the date of the reasoned opinion, GSs remained valid in *Telefónica*, *Endesa*, *Repsol* and *Iberia*. Four months after the reasoned opinion, on 25 November 2005, the government announced its decision to abrogate GSs, stating in a letter to the Commission that the compliance process with the judgment has begun (El País 26/11/2005). The government declared that it no longer needs the GSs and the new law will soon abolish them (ibid). In due course GSs in *Iberia* expired - the regime applied for the whole period initially intended, thus the government has met its own target regarding the application of GSs. Same

Law No.13/1998 of 4 May, (ROJ: STS 5197/2001); Appeal: 325/1999, Judgment of 18/06/2001, *Tobacconists Union de Asociaciones de Estanteros de España* against Royal Decree 1199/1999, of 9 July, which implements Law No.13/1998 of 4 May, (ROJ: STS 5164/2001); Appeal: 330/1999, Judgment of 18/06/2001, *Tobacconists Asociación Profesional Estanteros Catalan* against Royal Decree 1199/1999, of 9 July, which implements Law No.13/1998 of 4 May, (ROJ: STS 5195/2001)

²⁰⁰ See relevant paragraphs of the CJEU's preliminary judgment issued on 26 April 2012 in Case C-456/10 *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT)*, Preliminary ruling requested by the Tribunal Supremo (Spain).

applies to *Repsol* as its regime ceased to exist meeting the estimated ten year protection target.

In April 2006 it has been reported that the draft legislation has been blocked on its way to implementation (Legal Week 13/04/2006). Yet one month later, the government led by José Zapatero has implemented the legislative compliance measure. The Law No.13/2006²⁰¹ repealed GSs of Law No.5/1995, alongside the relevant provisions of Law No.62/2003 and all the Royal Decrees. The Law No.13/2006 itself comprised of a single article. In the preamble the government accentuated that previous amendment of Law No.62/2003 has been implemented due to the usefulness of GSs at a time and back then the government has been determined to retain GSs. The government went on, however, that following ‘a more than reasonable period of validity, during which the former regime has proven useful’ the stability of companies in question has greatly improved so GSs are no longer necessary.²⁰² The above statement confirms that the Spanish government resorted to non-compliance following the judgment because the condemned GSs have not yet fulfilled their protectionist aims. However, once GSs in question have actually achieved their purpose they could be duly and fully repealed. In the preamble the government also mentions its ‘duty to comply with the judgment of the CJEU and preventing the imposition of financial penalties’.²⁰³ Effectively, compliance measures of the Law No.13/2006 applied to GSs in two companies out of seven – *Endesa* and *Telefónica* – withdrawing GSs merely one year prior to their estimated expiry dates.

While GSs have been relatively easy dropped in tobacco, banking and airline companies, the government resisted to comply and repeal GSs in energy and telecom companies. It could be ascertained that Zapatero’s government moved relatively quickly towards final compliance, however, it took one unsuccessful amendment, penalty procedure which went into advanced stage and total three years to finally comply.

The government has repealed GSs in *Telefónica* and *Endesa* and there are certain reasons for that. Firstly, during the nine year GSs protection, *Telefónica* has aggressively acquired (Bonardi 2004) and grew into a large multinational enterprise in near monopoly conditions (*e.g.* Clifton *et al* 2010: 1003) becoming immune to

²⁰¹ Law No.13/2006 of 26 May 2006 (BOE No.126 of 27/05/2006).

²⁰² *Ibid*, preamble, I, *op. cit.*

²⁰³ *Ibid*, preamble, II and III, *op. cit.*

takeovers – overly large and expensive (Bethel *et al.*, 1998). Secondly, *Endesa* has been protected through other GSs implemented in 1999 and in 2006 the latter has been exclusively implemented by Zapatero to shield the company from an unwelcome takeover. It is logical to assume that three analogous mechanisms protecting a single company might not be necessary, so one of them, which have a looming penalty threats, could indeed be repealed. Such substitution of one protectionist regime with another similar measure signifies that the Spanish government gravely disregarded the sincere cooperation obligation and resorted to obstructionist protectionism despite the EU institutions' clear-cut policy on the matter.

All in all, it could be ascertained that the government resorted to non-compliance resisting to fully repeal GSs of Law No.5/1995 before they have met their protectionist targets, making the CJEU's judgment on case C-436/00 appear as changing little if anything. The mere fact that in spite of the lengthy judicial proceedings, condemning judgments and penalty procedure the government succeeded in pursuing its protectionist aims points towards bad faith behaviour. In this case the enforcement action under Article 258 TFEU failed to facilitate compliance, so the core enforcement effectiveness/obstructionist hypothesis (H1) is confirmed. Compliance 'by amendment' also proved to be minimalist and inadequate, so the supporting hypothesis on effectiveness of minimalist compliance (H1a) is also confirmed. Since the ultimate compliance 'by repeal' has only been achieved at the advanced stage of the second round enforcement action under Article 260 TFEU, the second enforcement effectiveness hypothesis (H2) is confirmed.

Following the judgment on the first Spanish GSs in case C-436/00 some observers stated that a major obstacle for foreign investment has been eliminated and companies at issue shall become takeover targets (Corporate Legal Times (August 2003). However, Spanish state-driven protectionism remained a reality as GSs of 1999 restricted voting rights in the companies operating in energy sector, such as *Endesa* and shall become subject of the following discussion.

2.2. ‘Anti-EdF’ Law – the Spanish Version

At the time of the judgment on first Spanish GS case the battle for a second GS measure, which specifically applied to energy companies and the associated takeover saga, have been in full swing. Compliance with the said judgment on case C-274/06 is analysed as follows: Section 2.2.A presents an overview on special rights, Section 2.2.B analyses the Spanish government’s conduct during the infringement procedure, Section 2.2.C assesses potential for compliance and subsequent compliance initiatives, while Section 2.2.D concludes with assessment of final compliance.

2.2.A: The Law

As discussed in Italian case C-174/04 on ‘anti-EdF’ GSs, the existing asymmetry in openness of the energy markets has triggered the introduction of protectionist measures pursuant to reciprocity clause of the Energy Directive,²⁰⁴ which empowered MSs to employ regulatory and control mechanisms aimed at combating predatory behaviour. Similarly as it was the case in Italian ‘anti-EdF’ Law, the Spanish government sought to protect its national energy companies and implemented ‘anti-EdF’ Law No.55/1999²⁰⁵ which covered all Spanish energy sectors, such as gas, oil and electricity. The law allowed the government to restrict the exercise of voting rights in energy companies by investors that are owned or controlled by a (foreign) government and hold dominant position in the relevant domestic market. In cases if such entity takes control or acquires significant shareholding of or above 3% of total share capital or voting rights (in a relevant Spanish company), the acquirer may notify the Spanish government and the government shall inform the National Energy Commission (CNE). The CNE in turn would propose a non-binding resolution and refer it back to the government for authorisation. The government then may approve, oppose, limit or subject the exercise of voting rights to certain conditions. Pursuant to Law No.55/1999 the governmental decision shall be based, *inter alia*, on the principles of objectivity, reciprocity, transparency, balance and proper functioning of energy markets. Acquisitions which went through without the necessary approval from the

²⁰⁴ Article 3(1), and Article 19(5), Article 22 Electricity Directive, *supra* note 103.

²⁰⁵ 27th Additional Provision of Law No.55/1999 of 29/12/1999 (BOE No.312 of 30/12/1999).

government will be suspended and the buyer would not be able to exercise the acquired voting rights.

It is clear that Law No.55/1999 created *ex post* GSs measure which lacked precision and was broadly defined, allowing the government wide discretionary powers to approve, veto or impose conditions if foreign acquisitions by a state-controlled company could undermine balance and proper functioning of energy markets. The law in question particularly targeted predatory behaviour by companies such as *EdF*, limiting their participation in control of Spanish energy sector and thus discouraging unwelcome investors from entering Spanish market. The provisions of ‘anti-*EdF*’ Law have been applied in May 2001, when the government limited the exercise of voting rights at 3% ceiling for Portugal’s *EdP* and France’s *EdF* in Spanish electricity company *Hidrocantábrico*.²⁰⁶ Similar intervention occurred when Spain used GSs of Law No.55/1999 in Spanish company *Adygesinval*, in which *EdP* held the majority of total share capital (Pires 2001). In 2002 the government intervened in another two cross-border deals: firstly when Italian *ENEL* acquired Spanish *Electrica de Viesgo* and later when Danish *Energi E2* acquired Spanish *Cinergy Group* (Roig *et al* 2003; 7). Government interventions of this art clearly impede free movement of capital, so the Commission entered into negotiations with the Spanish government, urging it to remove GSs and comply with the Treaty.

2.2.B: Negotiations, Amendments and Judicial Proceedings

On 11 July 2003 the Commission issued a reasoned opinion, allocating two months for compliance (European Commission IP/02/1489). One month prior to the issue of the opinion on Law No.55/1999 the CJEU overruled Spanish Law No.5/1995, so the Spanish government decided to please the Commission by simultaneously amending both laws in question: one already found illegal, another with a looming action before the CJEU. The Law No.62/2003²⁰⁷ has amended ‘anti-*EdF*’ Law by introducing several changes to the GS regime. Originally, Law No.55/1999 granted potential acquirers with the *right* to notification if they wished to exercise their voting rights above the 3% ceiling, whereas following the amendment eligible investors were *obliged* to notify the authorities. Law No.62/2003 sets the two month ‘reflection period’ for the government to issue its

²⁰⁶ Commission Decision (19/03/2002) *EnBW/EDP/Cajastur/Hidrocantábrico*, Case M.2684, SG (2002) D/228961/228962/228963.

²⁰⁷ Article 94 of Law No.62/2003, *supra* note 194.

decision either by resolution or by silence, which should be adopted in accordance with the objective criteria and based on the facts of the situation at issue, assessing whether or not the takeover or acquisition may possess significant risks or adverse effects on the activities of the national energy market.

Provisions of Law No.62/2003 applied a similar *fit-and-proper test* for acquirers (as the ones implemented in amendment of Law No.5/1995), providing that the existence of significant risks or adverse effects shall be assessed having regard to transparency and reliability of acquirer which would enable him/them to adequately carry out the relevant activities and to ensure secure, uninterrupted delivery of services alongside with the need to preserve and develop the infrastructure of the relevant markets.²⁰⁸ The new amendments introduced several important changes limiting the vague, imprecise and undisclosed criteria on which the government assessed merits of the case, introducing a two month ‘reflection period’, approval by silence clause and introducing *fit-and-proper test*. The Law No.62/2003 became subject of a bilateral meeting held on 27 February 2004 when the Commission criticised the insufficiency of amendments.²⁰⁹ Spain drafted additional amendments, which the Commission had rejected issuing a new formal letter on 9 July 2004. Almost seven months later the government submitted a draft of a new law, yet the next move by the Commission was to issue a new reasoned opinion on 13 July 2005, allocating two months for compliance.²¹⁰ Spain has not replied to the reasoned opinion, so the Commission brought the matter before the CJEU.

During the written procedure before the CJEU the Commission maintained that Law No.55/1999 (as amended) was restricting voting rights of investments by state-owned entities and thus discouraged such investments.²¹¹ Spain argued that the law in question does not constitute an obstacle to free movement of capital, as it does not veto the exercise of voting rights but merely allows for their non-recognition in situations which are ‘potentially dangerous for the maintenance of public safety’.²¹² Spain maintained that the ownership of the rights is not restricted but only the voting rights attached to them.²¹³ While referring to the similar Italian

²⁰⁸ Case C-274/06 *Spain*, note 46, para.4.

²⁰⁹ *Ibid*, para.5.

²¹⁰ *Ibid*, para.6.

²¹¹ *Ibid*, paras.8-10.

²¹² *Ibid*, para.13.

²¹³ *Ibid*, para.13

‘anti-EdF’ Law No.192/2001,²¹⁴ Spain argued that the Law No.55/1999 does not provide for automatic suspension of voting rights above certain threshold ceiling, as the Italian provision does.²¹⁵

The CJEU did not accept any of the foresaid justifications, stating that a mere power reserved for the government to decide on whether or not to allow or limit the exercise of such rights, acts as a deterrent for potential public investors from other MSs.²¹⁶ Spain justified notification regime by the necessity to guarantee the security of the energy supply, however the Commission argued that the GSs at issue are disproportionate, legally uncertain and imprecise.²¹⁷ Confirming its findings in judgment on Italian ‘anti-EdF’ Law in case C-174/04, the CJEU held that the aim of promoting the competitiveness in the energy market cannot justify protectionist measures which restrict capital movements.²¹⁸ Consequently, on 14 February 2008 the CJEU ruled that Spain has failed to prove that Law No.55/1999 is appropriate for ensuring the security of the energy supply and therefore, by maintaining the said measures, has failed to fulfil obligation imposed on it by the provisions of the Treaty.²¹⁹

2.2.C: Obligation to Comply

The infringement procedure on ‘anti-EdF’ Law went on for five years and four months in total, during which the Spanish government has undertaken several steps towards compliance – which could point towards behaviour in accordance with the sincere cooperation obligation. Compliance measure of Law No.62/2003 has been implemented three months later than the date stipulated in the reasoned opinion. It is remarkable that at this point the Commission decided not to refer the matter to the CJEU, despite unpunctuality of the said amendments. The government, on its part, has not repealed the GSs of already overruled Law No.5/1995 and scrutinised ‘anti-EdF’ Law, but opted to try and justify both GSs laws by the single provision of Law No.62/2003. This tactics in turn led to procrastination on the implementation of ultimate compliance measures in both cases. In the present case the Commission had to issue a supplementary letter of formal notice and a new reasoned opinion, to

²¹⁴ See Chapter ‘1.2. Urgent Golden Shares for Energy Market’ of this study.

²¹⁵ Case C-274/06 *Spain*, note 46, para.14.

²¹⁶ *Ibid*, paras.26-27.

²¹⁷ *Ibid*, paras.29-31.

²¹⁸ *Ibid*, para.44.

²¹⁹ *Ibid*, para.53.

which the Spanish government failed to reply whatsoever. The Commission could have based its referral to the CJEU on the original provisions of Law No.55/1999, yet it has decided to use an additional administrative stage, extending the proceedings at issue. If it would have referred the case following the expiry of allocated two month compliance period, the Court would have established the infringement of Treaty much earlier.

In line with the supporting hypothesis (H1a) applied in this study, condemning judgment on provisions of Law No.55/1999, as amended by Law No.62/2003, demonstrates that the infringement of the Treaty could remain in place following the compliance ‘by amendment’. To conclude: amendments were not only unpunctual, they were inappropriate compliance measures. All in all, following the judgment Spain has been obliged to finally comply and compliance in good faith would involve full repeal of ‘anti-*EdF*’ Law of 1999 and Law No.62/2003.

2.2.D: Final Compliance

As proposed by the supporting hypothesis on effectiveness of minimalist compliance (H1a), any compliance ‘by amendment’ of contested measures would most likely be of inadequate or minimalist character consequently postponing the full compliance. In the present case amendments of Law No.62/2003 were implemented at the time when the GSs were under the Commission’s scrutiny, yet prior to the referral to the CJEU, so they also could have been liable for causing procrastination. Nevertheless, non-compliance with EU law prior to the judgment and non-compliance with the condemning judgment itself result in comparable, yet different compliance obligations. From one side the government has been obliged to comply with the ruling by either amending or repealing the GS regime, yet from the other – it had to avoid electoral punishment by ensuring continuous protection over vulnerable energy champions, such as *Endesa*.

On 30 April 2009 the government implemented DL No.6/2009²²⁰ which fully repealed ‘anti-*EdF*’ Law – rationalising its implementation by the urgent and extraordinary necessity to address the judgment of the CJEU.²²¹ The repealed Law No.55/1999 has been effective for almost a decade serving up to its protectionist purpose, targeting and discouraging unwelcome public bidders from other MSs. From the onset, the government’s performance in complying with CJEU’s judgment

²²⁰ Royal Decree-Law No.6/2009 of 30/04/2009 (*BOE* No.111 of 7/05/2009).

²²¹ Royal Decree-Law No.6/2009, *op. cit.*, ‘Preamble’.

on ‘anti-*EdF*’ Law could be seen as compliance in relatively good faith, yet it took an issue of two formal letters and two reasoned opinions, one condemning judgment and nine and a half consecutive years of non-compliance with the fundamental freedoms of the Treaty. Consequently, the Spanish government has been given sufficient time to promptly comply immediately following the judgment, without a fourteen-month delay. Such considerable compliance delay reveals unnecessary procrastination which implies that the government disregarded its obligation to comply as soon as possible and without delay.

There also has been another, more prominent, reason why the government has fully complied by repealing energy GS of Law No.55/1999. In the light of the following finding the government’s compliance with the judgment could be seen as action in bad faith towards the sincere cooperation obligations stemming from Article 4(3) TEU. The fact is that the government choose to replace overruled GSs of Law No.5/1995 and the scrutinised ‘anti-*EdF*’ Law with another GS law – this explains the promptness of compliance with the judgment under analysis.

The GS protection implemented for *Endesa* pursuant to Law No.5/1995 has been eliminated on 26 May 2006 due to the first ruling on case C-436/00 and now following the condemning judgment on ‘anti-*EdF*’ Law in case C-274/06, the company could become vulnerable to foreign takeovers if it was not for another set of newly implemented GSs. Prior to the elimination of unjustified GS provisions on 26 May 2006 and at a time when it was clear that the Commission would most likely refer the matter on Law No.55/1999 to the CJEU (following the reasoned opinion of 7 July 2005 to which Spain failed to reply), on 24 February 2006 the government implemented yet another GS – DL No.4/2006.²²²

Because of the availability of these alternative GSs, provisions of ‘anti-*EdF*’ Law No.55/1999 were no longer necessary and could be repealed as a result of 2008 judgment. Therefore, the wider compliance assessment on Spanish GS judgments reveals that compliance with case C-274/06 is less of a ‘good faith’ than initially perceived. In any event the ultimate compliance in this case has been achieved with a considerable delay, which, as the core enforcement effectiveness hypothesis of this study (H1) suggests, would not qualify as compliance in good faith. In cases when the MS does not withhold from implementing and maintaining of similar GSs, it would be seen as acting contrary to the sincere cooperation obligation and resisting

²²² Royal Decree-Law No.4/2006 of 24/02/2006 (*BOE* No.50 of 28/02/2006, p.8016).

to embark on a wider policy change in relation to such protectionist measures. Consequently, the overall compliance conduct, surrounding the implementation of compliance measures with judgment on ‘anti-*EdF*’ Law of 1999, reveals that Spain disrespected its obligations under the sincere cooperation principle.

To conclude, the Spanish government’s compliance conduct with the judgment on case C-274/06 appears to be neither in good faith nor could it qualify as obstructionist non-compliance in bad faith. In this case the pre-judgment conduct reveals cooperation in relatively good faith. The minimalist character of initial compliance measures proved to be inadequate, triggering further infringement action and supporting the hypothesis on effectiveness of minimalist compliance (H1a). The ultimate compliance ‘by repeal’ has been implemented way past the six month compliance threshold in order to qualify as compliance in good faith. The compliance has neither been achieved within a twelve month period, which signifies that enforcement mechanism of Article 258 TFEU has not been successful in facilitating prompt compliance. In this case the pre-judicial procedure comprised of two sets of official warnings, stretching to staggering thirty four months. Given that the Spanish government has been given more than enough time to prepare for prompt compliance, the post-judgment compliance should have followed immediately and not with such a considerable delay, which points to disregard of obligation to comply ‘as soon as possible’. Another significant case-specific factor that influenced compliance is the fact that other GSs were implemented to substitute the ones under the Commission’s scrutiny. This finding signifies that by substituting of the scrutinised GSs with new protectionist measures Spain has acted contrary to sincere cooperation obligation. Since compliance with judgment on case C-274/06 has failed to prompt a wider policy shift at the national level, (H3) is confirmed. Due to the above findings, Spain could be seen resorting to obstructionist protectionism and *obstructionist non-compliance*. This case also clearly demonstrates how the enforcement action under Article 258 TFEU could fail to facilitate prompt and comprehensive compliance, even though no further action under Article 260 TFEU has been applied.

2.3. ‘Anti-*E.ON*’ Law in Action

Before the abrogation of GSs in *Endesa* and at a time when ‘anti-*EdF*’ Law has been put to the Commission’s scrutiny, Spain has implemented new GS law – DL No.4/2006.²²³ This law, also known as ‘anti-*E.ON*’ Law, became subject of two rulings of the CJEU: on case C-196/07²²⁴ relating to application of GSs for blocking the takeover of *Endesa* and case C-207/07²²⁵ on the GS law itself. The former case directly relates to the latter so the discussion on the takeover is relevant as it discloses the rationale behind the creation of GSs and revealing the government’s obstructionist protectionist conduct which points towards the subsequent resistance to comply with CJEU judgments. The analysis of compliance with judgment on case C-207/07 proceeds as follows: Section 2.3.A focuses on introduction of GSs, Section 2.3.B analyses the government’s conduct during infringement proceedings on both cases C-196/07 and C-207/07. Section 2.3.C assesses potential for compliance. The concluding Section 2.3.D analyses the current compliance situation. The conclusion reveals that intentional partial compliance was envisaged only once a favourable situation for the Spanish government has been established. This compliance conduct could be seen as contrary to the sincere cooperation principle, so that all of the effectiveness/obstructionist hypotheses developed in this study will be confirmed in this case.

2.3.A. *Endesa* Takeover and ‘anti-*E.ON*’ Law

Spain’s biggest and one of the most important electricity companies *Endesa* has always been protected by the government: first through public ownership, then by the GSs of Law No.5/1995 until 26 May 2006 and by Law No.55/1999 until 7 May 2009. The Spanish government sought to make *Endesa* another national champion like *Iberdrola* (Pugsley 9/05/2008). In contrast to *Iberdrola* the state has significantly participated in *Endesa* right from the company’s inception, so it has enjoyed privileged contact with policy-makers (Clifton *et al* 2010: 1003). The government sought to re-enforce *Endesa*’s competitiveness through a state-promoted takeover involving another Spanish company *Gas Natural* (The New York Times 22/02/2006; The Economist 31/08/2006; El Pais 3/05/2003; El Pais 7/09/2005).

²²³ Royal Decree-Law No.4/2006, *op. cit.*

²²⁴ Case C-196/07 *Spain*, note 17.

²²⁵ Case C-207/07 *Spain*, note 46.

Endesa's shareholders considered *Gas Natural*'s takeover bid of September 2005 as politically motivated and sought for possible alternatives and higher bids.²²⁶ When on 21 February 2006 the German company *E.ON* has launched an appealing offer for *Endesa*,²²⁷ the Spanish government strongly opposed to it (El Pais 24/02/2006), laying the beginning of the so-called '*Endesa* takeover saga' which lasted for two years.²²⁸ The core of the underlying interests could be seen as the clash between the government's obstructionist non-compliance with the free market rules coupled with the desire to model the national energy market, and the Commission's strive to eliminate GSs and force a disobedient MS to comply.

E.ON's ambitious takeover reached far beyond the mere economic interests, becoming a matter of a political battle: both the German and Spanish governments discussed this sensitive issue, as there have been concerns that the Spanish government led by the Prime Minister Zapatero may employ its still-valid GSs of Law No.5/1995 to veto *E.ON*'s offer (El Pais 22/02/2006a). The day following *E.ON*'s bid the Commission had expressly reminded the Spanish government that it should not employ GSs (Euobserver 23/02/2006). In reply, Zapatero has confirmed that the government seeks to protect public interests in strategic industries, however it is not anticipating using overruled GSs, which could be 'too extreme' and could only be applied 'in truly exceptional circumstances' (El Pais 22/02/2006); BBC News Online (22/02/2006). Clearly, application of any protectionist measures could severely damage Spain's reputation as a MS with an open economy and a pro-European stance. However, the government was not willing to give up without a battle and allow a foreign company to take over its 'crown jewel' *Endesa*.

Disregarding Zapatero's reassurances three days after *E.ON*'s bid, the government has urgently introduced a new GS DL No.4/2006,²²⁹ extending the rights of the National Energy Commission (CNE). The latter authority has been granted a special right to issue an *ex ante* approval on acquisitions of shareholdings in excess of the 10% ceiling of the total share capital or any other significant influence by any energy company in Spanish energy companies. As discussed in the

²²⁶ According to the EU Takeover Directive the target company's Board of Directors must remain passive following the bid, however Article 9 of the Directive allows the Board to seek alternative bids, the so-called 'white knight exception'.

²²⁷ European Commission Decision (25/04/2006) Case No.COMP/M.4110 – *E.ON/Endesa*, SG-Greffe(2006) D/202193.

²²⁸ European Commission Decision (26/09/2006) C(2006)4279 final and Decision (20/12/2006) C(2006)7039 final, on Case COMP/M.4197 *E.ON/Endesa*.

²²⁹ Royal Decree-Law No.4/2006, *supra* note 222.

previous case on ‘anti-*EdF*’ Law of 1999, originally the CNE had to be informed of foreign acquisitions, analyse their impact on the energy sector and then issue a non-binding resolution which would be subject to governmental approval. In the foresaid case, the government itself decided upon the issue: whether to veto, approve or impose conditions on the notified deal. In the present case, the government has shifted the approval right to the CNE – an authority over which it had a substantial influence. According to DL No.4/2006 the acquirer had to apply for approval prior to an acquisition and the CNE would apply a *fit-and-proper test*²³⁰ to assess the acquirer’s reliability, adequacy and potential influence on security and continuity of services delivery. The CNE could deny approval or subject it to conditions due to existence of significant risks or negative effects on the activities of national companies concerned or for the protection of the general public interests in the energy sector or due to any other concern on public safety and security.²³¹

The takeover of *Endesa* by *E.ON* was of the EU dimension and pursuant to the Merger Regulation²³² the Commission had the exclusive authority of approval, yet the DL No.4/2006 indirectly shifted this right of approval to the Spanish government through the CNE. The government stressed on extraordinary urgency of DL 4/2006, rationalising its implementation by the excessive concentration in European energy market and emphasising on a need to address the existing asymmetries by creating a legislation which would cover all interests that needed to be protected.²³³ It is apparent that by urgently implementing DL No.4/2006 the government has exclusively targeted *E.ON*’s pending takeover offer, allowing the CNE to frustrate the bid, which points towards the specific ‘anti-*E.ON*’ aim of the GSs. The urgency of the GSs appears to be in conflict with the earlier statements on non-intervention by the Spanish government. Following the implementation of this GS law the long ‘political battle’ between the Commission and Zapatero’s government has begun (The Economist 6/11/2008).

2.3.B: Two Infringement Procedures

The implementation of the protectionist DL No.4/2006 alarmed the Commission, prompting it to remind the Spanish government that pursuant to the

²³⁰ See ANNEX III of this study for application criteria.

²³¹ Case C-207/07 *Spain*, note 46, para.4.

²³² Council Regulation 139/2004 EC [2004] OJ L24/1, Merger Regulation on the Control of Concentrations Between Undertakings, (Merger Regulation), paras.8-11.

²³³ See preamble to Royal Decree Law No.4/2006, *supra* note 222.

sincere cooperation principle enshrined in Article 4(3) TEU it must not impose any conditions on *E.ON*'s bid.²³⁴ On 5 May 2006 the Commission issued a formal letter under Article 258 TFEU informing Spain of the illegality of DL No.4/2006.²³⁵ Ignoring the concerns raised by the Commission the government insisted on the compatibility of the measures in question and on 27 July applied the DL No.4/2006 to *E.ON*'s bid – the CNE issued a Resolution subjecting the bid to nineteen conditions.²³⁶ The press dubbed these unprecedented conditions as 'swingeing' and 'harsh', while the Commission called them 'arbitrary discrimination' (The New York Times 28/07/2006; El Pais 6/08/2006). Put shortly, the imposed conditions created a system of long-term control and monitoring allowing the government, through the CNE, to control *E.ON*'s activities post-takeover.

Some conditions concerned *Endesa*'s post-takeover status, restricting *E.ON*'s freedom to decide on managerial, operational and economic matters. For example, *E.ON* could not restructure *Endesa* or re-locate its headquarters. The CNE could assess the financial situation for *Endesa* and any future investment plans by *E.ON*, requiring the later to follow the already established plans and policies. *E.ON* was prohibited from participation in daily management of certain sectors of *Endesa*'s business and had to divest certain assets. The CNE had the right to authorise the disposal of assets and precluded *E.ON* from pursuing self-interests when adopting strategic decisions regarding *Endesa*. The CNE would supervise *E.ON*'s conduct and in case of non-compliance with any of the conditions it could suspend the voting rights held by *E.ON* or oblige it to divest all of its shares held in *Endesa*. In case if any other company acquired more than 50% of *E.ON*'s shares it would have to notify the CNE which in turn may oblige *E.ON* to divest all of its shares held in *Endesa* to a third party approved by the CNE. As one can see, these severe conditions were of an extremely controversial nature: they were not of a market standard, not economically viable and absolutely disproportionate, significantly limiting *E.ON*'s corporate rights. Effectively, the conditions assumed the control over *Endesa* to the government through the CNE.

The imposed conditions reveal that the Spanish government has been determined to dissuade *E.ON* from entering the Spanish market despite a clear-cut position of the EU Commission on such intervention. The German government also

²³⁴ Case COMP/M.4197 *E.ON/Endesa*, note 228228, para.28.

²³⁵ Case C-207/07 *Spain*, note 46, para.7.

²³⁶ Case COMP/M.4197 *E.ON/Endesa*, note 228, para.19.

openly expressed its concerns on Spanish protectionist move and on 12 September 2006 both Spanish and German leaders have met to discuss the situation (Focus 12/09/2006; El Pais 20/04/2006). The Commission on the other hand was determined to rapidly resolve the time-sensitive matter threatening the cross-border takeover deal.

On 26 September 2006 the Commission issued a reasoned opinion regarding the ‘anti-*E.ON*’ DL No.4/2006 under Article 258 TFEU²³⁷ and also adopted a binding decision on the application of the said law to *E.ON*’s bid, ordering Spain to withdraw the unlawful conditions without delay (European Commission IP/06/1265). The government has resisted to repeal ‘anti-*E.ON*’ Law²³⁸ and to comply with the binding decision, so the Commission issued a formal letter (European Commission IP/06/1426). Faced with the two infringement procedures the government has amended some of the unlawful conditions: instead of wholly removing them it has moderately scaled down some of the most controversial ones while also introducing some new conditions.²³⁹ Such a dubious compliance measure could neither be seen as compliance in good faith nor in line with the sincere cooperation principle.

On 20 December 2006 the Commission issued a second binding decision, confirming that the new conditions of the CNE are unlawful and ordered their removal. The government resisted complying and prepared to defend the new conditions before CJEU. Since the judicial procedure would allow for the matters to drag on it would grant the government the necessary time for frustrating *E.ON*’s bid. The matter on non-compliance with the two decisions and the case regarding the ‘anti-*E.ON*’ Law got referred to the CJEU on 11 and 19 April 2007 respectively.

From the one point, the government has resorted to non-compliance and since the binding effect of the CJEU’s judgments was not likely in the foreseeable future, it continued to block *E.ON*’s bid. Yet from another point of view, taking the Commission’s pressure to comply, the government foresaw that the DL No.4/2006 would sooner or later be outlawed, so it sought for alternative solutions which would further frustrate *E.ON*’s takeover ambitions and retain *Endesa* in Spanish hands. The solution emerged in form of another government-orchestrated takeover, where Spanish company *Acciona* began building up a stake in *Endesa* alongside with

²³⁷ Case C-207/07 *Spain*, note 46, para.9.

²³⁸ *Ibid*, para.10.

²³⁹ Case COMP/M.4197 *E.ON/Endesa*, note 228, para.21&35-46.

Italian company *ENEL*, with which the Spanish government has reached an agreement over ownership of *Endesa*.²⁴⁰ The government was doing its best to scupper unwelcome cross-border takeover deal and frustrate *E.ON*'s bid so it choose to agree on Italian-Spanish solution to avoid further enforcement actions from the Commission (Pugsley 9/05/2008). The government-preferred contra-takeover strategy was a success as *Acciona* together with *ENEL* have launched a joint takeover for *Endesa* and *E.ON* has been forced to withdraw its bid.²⁴¹

During the judicial stage of the infringement procedure on case C-196/07 the government admitted that it has failed to withdraw the conditions, yet argued that the compliance with the two of the Commission's decisions could no longer be facilitated, since the *E.ON*'s takeover bid ceased to exist.²⁴² The CJEU stressed that the takeover has ceased after the deadline set in the reasoned opinion and since the government did not anticipate any steps towards compliance it is important to pursue the action in interest of laying down the foundations of responsibility for obstructionist non-compliance.²⁴³ The CJEU also emphasised that Spain has not shown that it is absolutely impossible to withdraw the conditions and that the principle of sincere cooperation requires that it must take all necessary measures in order to comply with EU law.²⁴⁴ Spain's second defensive argument was to challenge the legality of the Commission's decisions, stating that considering the importance of *Endesa* in the Spanish energy market, the conditions aimed at protection of public interest and ensuring the security of the energy supply.²⁴⁵ To this extent, the Court maintained that the imposition of the two decisions could not be deemed erroneous and their validity could not be challenged.²⁴⁶ On 6 March 2008 the CJEU established that Spain has failed to remove the CNE's conditions and thus failed to comply with two of the Commission's decisions.

In case C-207/07 on 'anti-*E.ON*' DL No.4/2006 the government also argued at cross-points with the Commission, insisting on proportionality and legality of the GSs. Spain argued that the wide discretion left to the CNE is necessary since it is

²⁴⁰ European Commission Decision (5/07/2007), Case No.COMP/M. 4685 – *Enel/Acciona/Endesa*, Brussels, 05-VII-2007, SG-Greffe (2007) D/204293/4; also *El Pais* (26/09/2006); *El Pais* (4/11/2006); *El Pais* (1/10/2006).

²⁴¹ Case No.COMP/M. 4685 *Enel/Acciona/Endesa*, *op. cit.*

²⁴² Case C-196/07 *Spain*, note 17, paras.20&24.

²⁴³ *Ibid*, paras.26-28.

²⁴⁴ *Ibid*, para.30.

²⁴⁵ *Ibid*, paras.22&24.

²⁴⁶ *Ibid*, paras.34-38.

impossible to foresee in a single legislative act all the risks which could threaten the energy supply.²⁴⁷ The CJEU, on the other hand, rightfully established that the objective of ensuring the security of the energy supply could be achieved via less restrictive *ex post* regime, so the system of *ex ante* approval is not proportionate while the criteria for its application are vague and imprecise, which leaves a wide discretion on the CNE.²⁴⁸ On 17 July 2008 the CJEU ruled that Spain has failed to demonstrate that the objectives behind the approval regime cannot be achieved by less restrictive measures, concluding that by adopting provisions thereof Spain has failed to comply with provisions of the Treaty on free movement of capital and establishment.

Following the two condemning judgments on cases C-207/07 and C-196/07 and being one of the more compliant MSs, Spain had been expected to comply promptly, especially since the threat in face of *E.ON* was gone. Following the judgments the government has expressed its determination to comply, stating that it is willing to amend the ‘anti-*E.ON*’ Law and to withdraw all conditions imposed by the CNE.²⁴⁹ However, the compliance was not so easily achieved.

2.3.C: Potential for Compliance

As a preliminary point it is necessary to emphasise that at a time when both ‘anti-*E.ON*’ DL No.4/2006 and its application on *E.ON*’s bid were referred to the CJEU, the Spanish government continued with its ‘business as usual’ by employing approval regime and imposing conditions on *Acciona/ENEL* joint takeover of *Endesa*.²⁵⁰ The Commission ordered to withdraw the conditions by 10 January 2008, yet the government persisted in non-compliance well past the established deadline, prompting the Commission to initiate yet another infringement action (European Commission IP/08/164, IP/08/746). The mere fact that the government used the DL No.4/2006 repeatedly, despite the Commission’s explicit preclusions, points towards, severe and obstructionist non-compliance. What is clear in the case of *E.ON*’s bid is that the government acknowledged that such a sensitive issue like takeover would not withstand a slow-moving infringement procedure. The government used all the possible procrastinations to stretch non-compliance for as

²⁴⁷ Case C-196/07 *Spain*, note 17, paras.27-30.

²⁴⁸ *Ibid*, paras.48-56.

²⁴⁹ SEC(2010), *supra* note 14, p.55.

²⁵⁰ Case No.COMP/M. 4685 *Enel/Acciona/Endesa*, *supra* note 240.

long as possible which points towards insincere behaviour and unwillingness to comply.

While waiting for the EU apparatus to issue decisions followed by formal letters, reasoned opinions and finally the judgments, Spain found the way out of the unwelcome *E.ON*'s takeover situation, particularly acknowledging that it had sufficient time for avoiding pre-judgment compliance. The judgments themselves, which were likely to be condemning, alongside penalty threats, which were not likely in the foreseeable future, could not deter the government from non-compliance and such conduct is contrary to the sincere cooperation principle. As regarding the pre-judgment amendments on conditions applicable to *E.ON*'s bid, it seems that the government used them as a 'smoke screen', avoiding full compliance which led to further procrastination. Taking the pre-judgment conduct of the government and in line with the hypothesis on obstructionist non-compliance it could be predicted that Spain would be eager to try and amend 'anti-*E.ON*' DL No.4/2006 in order to both resist full compliance and pacify the Commission. As the applied supporting hypothesis (H1a), suggests following the judgment the GSs measures ought not to be amended but repealed fully, so in case if the Spanish government chooses to comply 'by amendment' the DL No.4/2006 would most likely be insufficiently amended.

2.3.D: Assessing Compliance

Fifteen months following the judgments on case C-207/07 relating to GS DL No.4/2006 and case C-196/07 on the GS law application, there was still no compliance in sight. The compliance procrastination in the latter case seems especially disturbing since, as the government claimed during the infringement procedure, the conditions imposed on *E.ON*'s bid lacked on object and purpose and could be removed without unnecessary procrastination. On 3 November 2009 the Commission issued a formal letter under what is now Article 260 TFEU calling on Spain to comply.²⁵¹ The compliance with judgment on case C-196/07 followed shortly after the foresaid formal letter, when on 13 November 2009 the government withdrew all of the CNE's conditions – in this case the compliance with two of the Commission's decisions on *E.ON*'s bid has been delayed for almost three years and with decision on *Acciona/ENEL* bid – for 21 months.

²⁵¹ European Commission (IP/09/1628); COM(2011) 588 final, *supra* note 36, p.58.

Regarding compliance with the judgment on GS case C-207/07 the government has opted to amend its GSs by Law No.2/2011²⁵² which reformed the CNE's functions. Following this amendment, it has been stated that the contested provisions of the DL No.4/2006 were repealed,²⁵³ however, as the below analysis reveals, the CNE's right of approval has been modified and not altogether repealed. Pursuant to Law No.2/2011 the CNE had the right to approve acquisitions of shares by non-EU investors in eligible Spanish companies in excess of 20% of share capital or any lower significant influence. The approval may be denied or subjected to conditions if there is a real and sufficiently serious threat to public safety. The acquirer could appeal the CNE's resolutions in the administrative court. A stand-by clause applied to acquisitions precluding the acquirer from exercising voting rights, until the CNE's approval by resolution or by silence.

The amendments of Law No.2/2011 introduced several important changes: it replaced the *ex ante* regime with new *ex post* regime, which applies to non-EU investors and could be seen as a less restrictive measure. However, the amended regime appears as less legally certain and broadly defined, since it provides for any criteria for application of the CNE's approval in 'cases of real and sufficiently serious threat to public safety'. The earlier proclamations that the above amendment adequately addressed the CJEU's judgment could neither be confirmed nor accepted. What is clear is that the Law No.2/2011 appears as a framework, which needs to be justified by further provisions, as it cannot provide sufficient level of legal certainty by itself. Subsequently, the GS regime and its protectionist rights are still in place even post-amendment, so the Law No.2/2011 represent an inadequate compliance measure – or compliance in bad faith. If the foresaid measures would have been adequate, it could be said that the compliance has been finally achieved three years following the judgment, which still is quite late to qualify as compliance in good faith. The breach persisted nonetheless, despite condemning judgment, new infringement procedure for non-compliance and subsequent amendment of 2011.

On 28 February 2012 the government issued a preliminary draft of law²⁵⁴ which reformed the CNE by creating a new independent authority: the National Commission on Markets and Competition. The draft has shifted the right of approval

²⁵² Economy Law No.2/2011 of 4/03/2011, (BOE No.55 of 05/03/2011).

²⁵³ Judgment No.145/2012 of the Spanish Constitutional Court of 2/07/2012 (BOE No.181 of 30/07/2012), para.7.

²⁵⁴ Draft Law Creating the National Commission on Markets and Competition (8/02/2012) available at: <http://www.aedc.es/wp-content/uploads/2012/05/Borrador-Anteproyecto-LCNMC-2012.pdf>

from the CNE to the Ministry of Industry, Energy and Tourism, basically mirroring in detail the previous GSs provisions of the Law No.2/2011. The preliminary draft reveals that the government once again inadequately addressed the judgment on case C-207/07. It is pertinent to note here that the CNE has issued a commentary²⁵⁵ on the draft, stressing that the approval regime should be maintained as it is a necessary *ex post* monitoring mechanism, which aims to determine any significant risks or negative effects of acquisitions in Spanish energy companies, reinforcing the principle of legal certainty.²⁵⁶ In its commentary the CNE concluded that the approval should be understood as a monitoring function or supervisory function.²⁵⁷ It is pertinent to emphasise that such conclusions by the authority which was not independent from the government points towards extreme obstructionist nature of the GSs, since the government sought not only to maintain the regime, but expressly supported it, even though it has been proved illegal by the CJEU judgments and by the Commission's decisions.

The quest for compliance continued once the government has amended the preliminary draft²⁵⁸ transposing it into Law No.3/2013²⁵⁹ on 4 June 2013. The 9th additional provision of Law No.3/2013²⁶⁰ established a system for investments in energy markets, creating a system of notifications to substitute the earlier approval regime. Pursuant to Law No.3/2013 the foresaid Ministry of Industry, Energy and Tourism has to be informed on acquisitions of shareholdings in energy companies operating in the regulated sectors or companies which hold strategic assets of critical infrastructural importance (defined by law). The investors acquiring assets which have a potential of having a significant impact or influence on the activities of the said companies must notify the said acquisition to the Ministry within fifteen days following the acquisition. In cases where the Ministry considers that activities of the acquirer may possess a genuine and sufficiently serious threat to the security of the energy supply, within thirty days from notification it can impose conditions in

²⁵⁵ CNE Report (15/03/2012) Report on the draft Law of the National Commission of Markets and Competition, available at: http://www.cne.es/cne/doc/publicaciones/cne06_12.pdf

²⁵⁶ CNE Report (15/03/2012), *op. cit.*, p.9&72-73.

²⁵⁷ *Ibid*, p.76.

²⁵⁸ Congreso de los Diputados, 'The Draft Law Creating the National Commission on Markets and Competition' No.121/000028 of 19/10/2012 (BOCG-10-A-28-1, X Leg., No.28-4, Series A of 4/04/2013).

²⁵⁹ Law No.3/2013 of 4/06/2013 (BOE No.134 of 5/06/2013).

²⁶⁰ See ANNEX III of this study.

relation to the activity of the companies subject to the acquisition as well as specific obligations on the acquirer to ensure compliance.

According to the Law No.3/2013, the Ministry shall assess the risks in relation to: safety and quality of products/services, continuity of their supply, as well protection against the risk of inadequate maintenance of infrastructure, or any failure to comply with specific regulations that apply to the acquired assets or companies. The Ministry shall also take into account the stakes that the investor has acquired or intends to acquire in other companies. Pursuant to Law No.3/2013 any imposed conditions will respect the principle of proportionality and be necessary for the protection of the general interest.

As could be seen from the provisions of Law No.3/2013 the explicit *ex post* approval regime is replaced with *ex post* notification regime, which could trigger imposition of conditions and obligations similar to the ones which could previously be imposed by the CNE. One major difference is that the government restrained from implementing particular acquisition thresholds (previously 20%), solely referring to assets which could have a significant impact or influence to the acquirer.

The adopted law is now being formally analysed by the Commission for compliance with judgment on case C-207/07. However, as the supporting hypothesis on effectiveness of minimalist compliance (H1a) suggests, given that the law is once again amended and special powers are not altogether repealed it could be ascertained that subsequently the Law No.3/2013 may fail to facilitate full compliance. The Commission's analysis of the new amendments could take another several months before being finalised, allowing matters of non-compliance to drag on.²⁶¹ Even if the Law No.3/2013 of 4 June 2013 would be found to be an adequate compliance measure, it has taken the Spanish government five years to finally comply, which does not constitute action in good faith and in line with the sincere cooperation principle. At this point it could be concluded that the overall compliance pattern displayed during the two infringement proceedings (cases C-207/07 and C-196/07) the Spanish government could be seen as acting in bad faith gravely disregarding sincere cooperation obligation under Article 4(3) TEU and compliance obligation under Article 260(1) TFEU. In case C-207/07 all of the enforcement effectiveness/obstructionist hypotheses (H1, H1a, H2 and H3) are confirmed:

²⁶¹ Here it is sufficient to provide updates on the compliance. Following the adoption of Law No.3/2013 on 4 June 2013, the infringement case has indeed been terminated on 26 September 2013.

compliance measures were minimalist and inadequate, the MS failed to effectively and promptly comply with the judgment under Article 258 TFEU, ultimate compliance measures were implemented only at the advanced stage of the second enforcement action under Article 260 TFEU and the wider policy shift has not occurred.

Conclusion on Spain

Analysis of the compliance with judgments on Spanish GS cases revealed the determined and obstructionist non-compliance which goes in sharp contrast with this MSs' reputation as a compliant and a 'good European'. The below summary on compliance outlines that GSs were relinquished only when the initially established protectionist targets were reached and neither could the Commission's binding decisions nor the CJEU's judgments succeed in breaking the armour of GSs' protectionist powers and persuading the government to comply in good faith.

In the first judgment on case C-463/00 the CJEU overruled GSs implemented pursuant to enabling Law No.5/1995 in five companies (*Repsol*, *Telefónica*, *Endesa*, *Argentaria* and *Tabacalera*). At the time when the infringement procedure under Article 258 TFEU progressed to its advanced stage, the government expressly disregarded the sincere cooperation obligation by implementing new GSs for *Indra* and *Iberia*. All Spanish GSs were intended to remain in force until protectionist goals have been fully fulfilled. The Spanish government resorted to *inaction*, which, coupled with procrastination, allowed it to apply the said protectionist regimes to the fullest extent. Spanish government's conduct during the infringement procedure signifies that there has been a significant resistance to compliance. The government chose to amend GS regimes which were still in force following the judgment. As predicted by the supporting hypothesis on effectiveness of minimalist compliance (H1a), these amendments were insufficient to facilitate compliance and the amended GSs retained their protectionist powers. This inadequate compliance measure aided procrastination: basically it was a race against time – the longer the government procrastinated the shorter the period for GSs' application became.

By the time the reasoned opinion was issued under Article 260 TFEU the majority of GSs have expired. As regards the expired regimes in *Indra* and *Iberia*, it is apparent that the government was successful in implementing and maintaining (for the entirety of applicable period) the supposedly unlawful GSs, which points towards disregard of the sincere cooperation obligation. GSs in *Telefónica* and *Repsol* have also expired so the government did not address the compliance obligation either. Effectively, GSs in seven affected companies have expired or were repealed, but none of them as a direct result of the infringement procedures under Article 258 TFEU or the initial procedural stage under Article 260 TFEU.

The ultimate compliance with case C-274/06 has been achieved fourteen months following the judgment and only following the implementation of the urgent protectionist GSs, which specifically aimed at impeding of cross-border takeover deals involving *Endesa* ('anti-*E.ON*' Law). From this perspective compliance with the judgments on cases C-463/00 and C-274/06 was not in good faith as the Spanish government had revealed significant, even 'militant' resistance to compliance. Furthermore, the cases on the urgent 'anti-*E.ON*' Law (C-207/07) and its application (C-196/07) soundly demonstrate the distribution of powers between the MSs and the Commission on the issue of GSs' obstructionist nature: the Commission and the CJEU can issue binding decisions and judgments while the relevant governments could still fail to comply.

The wider analysis of the Spanish government's conduct during the entire length of the relevant infringement procedures on cases C-207/07 and C-196/07 reveal the grave disregard of the cooperation obligations. The quest for compliance with judgment on case C-207/07 continued at the time of writing (July 2013), as the government has continuously amended the GSs. It remains to be seen whether the latest compliance measure with ruling on case C-207/07 could be deemed as adequate compliance measure. To summarise: despite being one of the more compliant MSs and a 'good European', Spain went to great lengths to battle for its GSs. All GSs have served up their initial purpose, in spite of the numerous infringement proceedings, imperative amendments and craven attempts to pacify the Commission. According to these findings it could be ascertained that the Spanish protectionism has successfully overcome all of the compliance instruments available to the Commission, which demonstrates that Spain has disregarded the principle of sincere cooperation and acted contrary to the good faith obligation. Consequently in all of the Spanish GS cases all of the enforcement effectiveness/obstructionist hypotheses developed in this study are confirmed, with the sole exception of 'anti-*EdF*' GSs in case C-274/06 where effectiveness of penalty procedure hypothesis (H2) did not apply.

3. The UK: the Leader in Golden Share Implementation

3.A: General Introduction

The United Kingdom has long cherished the system of market-oriented industrial capitalism according to which companies should be allowed to compete freely with each other and market forces should decide on the fate of any hostile takeovers – and not the government, which maintained a hands-off approach to the management of the SOEs (*e.g.* Foreman-Peck, Millward 1994; Monti 2010: 29; Schmidt 2002:152). The UK has been considered as the most ‘pure’ free market model (Crouch, Streeck 1997: 4). This competition-centred shareholder-oriented model goes in sharp contrast with legal and cultural background of pervasive state *dirigisme* so typical of many other MSs (Schmidt 2002: 76,154).

The British government led by Margaret Thatcher sought to apply this model to SOEs by means of radical, wide-ranging, ideologically and politically driven privatisation, which has begun almost a decade earlier than anywhere else within the European Union (Heald 1989: 29; Bishop, Thompson 2003). The government has fully privatised companies operating in major strategic and network industries, making share ownership of such companies highly diffused (Bishop, Thompson 2003:40; Goyer, del Real 2009). However, while being a pioneer in privatisation the UK also became the birthplace of the classic example of GS. In contrast to other MSs, the British GSs could have more grounds since the UK companies were generally following the ‘one share-one vote’ principle and protectionist CEMs were rarely used (Conway *et al* 2008: 642).²⁶²

For the purpose of this general introduction it is necessary to note that the UK has a rather troubled relationship with the EU and has long appeared as Eurosceptic in comparison to other MSs, particularly demonstrating low public and elite’s support for the EU, its institutions and policies (Georde 2000; Nugent, Phinnemore 2010). While being a Eurosceptic the UK is also one of the most powerful MSs with strong economy, and according to some compliance enforcement theories, it could afford to bear the costs of non-compliance (Panke 2010: 252). Nevertheless the UK is one of the most compliant MSs (Börzel 2001: 818; Tallberg, Jönsson 2001: 26) and the following analysis of compliance with GS-related judgment could support this statement. When addressing the compliance obligations stemming from the GS

²⁶² Also Report on the Proportionality Principle in the European Union (2007).

judgment of 13 May 2003 on case C-98/01 the UK could be seen as acting in line with the sincere cooperation obligation. This chapter shall proceed as follows: Section 3.B analyses the essence of GSs as well as how they were brought to the attention of the Commission. Section 3.C evaluates the UK's conduct during the infringement procedure. Section 3.D analyses the UK's inclination to comply and its compliance initiatives. Section 3.E draws the conclusions approving the UK's compliance in good faith.

3.B: Golden Shares and Special Rights

The British measures represented a GS in its purest sense: a situation where special provisions would be inserted into company's Articles of Association at time of privatisation, granting the special shareholder – the government – special rights which were attached to a single GS with a nominal value of £1. GSs were introduced in 22 newly privatised companies and were held by the Secretary of State (or Minister) responsible for the privatised industry.²⁶³ The content of the special rights varied from company to company, yet generally they allowed to control the adoption of any strategic decisions, reorganisations, winding-up, appointment of directors, acquisitions of shares above a certain ownership ceiling or by a foreign entity, as well as inability of removing GSs from company's Articles of Association without the special shareholder's consent. Some GSs had an automatic expiry date and the government could redeem any of its GSs at any time and it often did so by disposing of unlimited GSs in several companies during government-preferred mergers or takeovers.²⁶⁴ Such redemptions indicate the UK government saw GSs as temporary mechanisms which should not be maintained for longer than strictly necessary.

On several occasions the UK government has used²⁶⁵ GSs to impede takeovers or as a bargaining tool for pressing companies to agree on a takeover at government-preferred terms.²⁶⁶ One example of effective dissuasive effect of GSs could be traced back to the UK biggest airport group operator *British Airports Authority (BAA)* and its GS dubbed as 'one of the strongest GSs of any privatised company' (The Times

²⁶³ House of Commons (6/10/1998) 'The Golden Share', Annex II for International Development - Eighth Report, The Future of the Commonwealth Development Corporation, HC 936.

²⁶⁴ *Ibid*; European Commission, SWD (2005), *supra* note 25, pp.9&16-17.

²⁶⁵ By 'used' the author of this study means that the GSs were used as a deterring tool, not that they have been officially applied to particular cross-border deal.

²⁶⁶ *Financial Times* (28/06/1984); *Financial Times* (29/06/1984); House of Commons (23/02/1988) 'Britoil', Vol. 128, cc149-60, c.149; House of Commons (20/07/1990), Britoil (Special Share), Hansard, Commons Sitting, Series 6 Vol.176, cc.1303-14, c.1308; *The Independent* (15/07/2000).

28/03/1990). *BAA* was a natural monopoly which owned and operated seven British airports. It was privatised under the Airports Act 1986 pursuant to which the government authority (Secretary of State for Transport) modified and approved the *BAA*'s Articles of Association also creating the time-unlimited GS provision on 7 July 1987.²⁶⁷

The Articles of Association established the *ex ante* approval regime, subjecting effectiveness of certain corporate decisions to written approval by the special shareholder – the government authority.²⁶⁸ In short, approval applied to any amendments to Articles of Association of *BAA* or provisions governing the GS regime, to decisions to dispose of control over airport-operating subsidiaries, winding-up and dissolution of *BAA* or its subsidiaries, as well as for disposal of airports. Basically, any restructurings or alienations of material assets of *BAA* were not possible without the approval of the government. GS also aimed at preventing anyone, but the special shareholder, from casting votes in excess of 15% of voting share capital at the time of adoption of any resolutions at any general meeting of the company's Board of Directors.

Following the British government's redemption of GSs in several companies there were speculations that *BAA*'s measures shall also be redeemed to smoothen the takeover path for the US company *ADT*, which was gradually building up its stake in *BAA* while lobbying hard for the British government to redeem its GS (*The Times* 17/10/1990; *The Independent* 30/03/1990). At that time the EU Commission began to be increasingly alerted on the matter of existing GSs. The precluded takeover approach by *ADT* and absence of expiry date or explicit justifications of *BAA*'s GS could have contributed to the Commission's pro-active intervention in the matter. It should also be noted that at that time the government became more cautious about introduction of new GSs, actively debating on exit strategies while dubbing GSs as 'golden handcuffs [that] are being put on the company'.²⁶⁹ With so many British companies protected by GSs, only *BAA*'s GS became subject to condemning judgment by the CJEU.

²⁶⁷ Case C-98/01 *United Kingdom*, note 52, para.8.

²⁶⁸ *Ibid*, para.10-11.

²⁶⁹ House of Commons (22/06/1999), Minimum Crown shareholding Commonwealth Development Corporation Bill [Lords], Clause 18.

3.C: Infringement Procedure

The Commission issued a formal notice to which the UK has not replied, so reasoned opinion followed on 6 August 1999 requiring the UK to comply within two months.²⁷⁰ The government replied with one month delay defending its right to define the characteristics of shares in private companies according to national company law.²⁷¹ The government claimed that its GS does not deny access to the BAA's share capital and is necessary for protection of the public interest.²⁷² The Commission did not pursue to press on this infringement until one year later (European Commission IP/00/1142), lodging an application on 27 February 2001. By that time even the Spanish GSs, which were introduced almost a decade after the UK measures, have already been put to the scrutiny of the CJEU.

During the litigation procedure the Commission argued that voting rights ownership ceiling and approval regime lacked on legal certainty, leaving wide discretionary rights to the government.²⁷³ The UK government, on the other hand, did not seek to justify its GS on grounds of overriding general interest or public security and its sole defence during the infringement procedure was that GS in BAA is a non-discriminatory private national law mechanism – so the Treaty provisions do not apply.²⁷⁴ The Commission insisted that BAA's GS could restrict foreign investors' right to access the UK market since the government was the sole beneficiary of the special rights.²⁷⁵ In this respect the UK asserted that GS does not affect daily management of the BAA. The CJEU established that since the GS were introduced by the government pursuant to the Airports Act, the measure represents a departure from normal operation of private law.²⁷⁶ As the UK has not sought to justify the measures at issue, on 13 May 2003 the CJEU ruled that GS held in BAA constitute a restriction on free movement of capital and establishment. Following the judgment the provisions of Airports Act 1986 that privatised BAA had to be amended or repealed to deplete the government's special right to approve and modify the company's Articles of Association, which also had to be amended in order to comply.

²⁷⁰ Case C-98/01 *United Kingdom*, note 52, para.15.

²⁷¹ *Ibid*, para.16.

²⁷² Advocate General (2003) Opinion by the AG Colomer of 6/02/2003 in Case C-463/00 *Spain* and Case C-98/01 *United Kingdom*, para.17.

²⁷³ Case C-98/01 *United Kingdom*, note 52, para.24.

²⁷⁴ *Ibid*, paras.22&27&35.

²⁷⁵ *Ibid*, para.33.

²⁷⁶ *Ibid*, paras.49&52.

3.D: Compliance with the Judgment

The *BAA* GS has been in place since 1987 and, as the example with frustrated takeover bid by *ADT* has illustrated, it has been effectively serving its purpose for sixteen years prior to the condemning judgment. Following the judgment *BAA*'s GS had to be redeemed or justified, yet these measures represented only one instance out of what used to be the widest distribution of GSs within the EU and their redemption would not have any effect on other such measures. Nevertheless, the judgment has considerably influenced the government's attitude towards GSs prompting significant policy shift toward their elimination.

Following the infringement procedure the government became much more cautious on introduction of new GSs: when evaluating the possibility of introduction of such measures, the government analysed them in light of ongoing infringement procedure on case C-98/01.²⁷⁷ As the infringement procedure went further into the reasoned opinion stage, the government found itself in limbo: on one hand it acknowledged the legal requirement to comply with EU law while on the other it sought to implement new GSs.²⁷⁸ In light of the Commission's challenge to the *BAA* regime, the government sought to ensure that any new GSs would be in line with EU law and justified on grounds of overriding public interest and national security.²⁷⁹

Following the Commission's announcement to refer the matter to the CJEU, the government acknowledged that the GS in *BAA* might be overruled²⁸⁰ and even though the CJEU's verdict would not be issued in months to come, the government got alarmed in a timely manner.²⁸¹ This conduct signifies that the UK has been preparing itself for the judgment by not only looking for possible solutions on how to justify new GSs,²⁸² but also by getting ready to comply in case of condemning ruling (The Times 14/03/2003). This behaviour could be indicative of the UK

²⁷⁷ See e.g., House of Commons (22/06/1999), *supra* note 269; House of Commons (8/02/2000) 'Crown shareholding', Hansard, Standing Committee E, Transport Bill, 12th sitting, Clause 49, Morning.

²⁷⁸ House of Commons (8/02/2000), *op. cit.*

²⁷⁹ House of Commons (27/07/1999) 'National Air Traffic Services', Hansard, vol.336, cc121-33, c.12.

²⁸⁰ House of Commons (15/11/2000) Hansard, Wednesday, vol.356, no.160, c.963.

²⁸¹ House of Commons (9/11/2000), Transport Bill, Hansard, Clause 38, [Directions in interests of national security etc.] c.1705-c.1707.

²⁸² House of Commons (8/02/2000), *supra* note 277; House of Commons (17/02/2000) 'Appendix C: NATS PPP - Golden Shares Environment', Transport and Regional Affairs Committee Publications Environment, Transport and Regional Affairs - Appendices to the Minutes of Evidence.

willingness to comply with the judgment in comprehensive manner, in line with the sincere cooperation obligation and in good faith.

The CJEU did not examine whether the *BAA*'s GS could be justified since the defendant chose not to invoke any justifications, even though the protection of a strategically-important company such as *BAA* could potentially be justifiable on grounds of public interest or national security. The government's non-invocation of any justifications could predict that it is unlikely that the UK government would have resorted to compliance 'by amendment' following the condemning judgment. On 16 September 2003 the government announced that the GS in *BAA* is no longer needed and in order to duly comply with the judgment it shall redeem its GS (Financial Times 17/09/2003).

When the EU Commission requested follow-up information on compliance, the UK replied that the government had announced of its intention to redeem the GS, also confirming that the redemption would be complete by mid-October 2003 (European Commission IP/04/17). True to its assurances the government redeemed GS in *BAA* by the specified deadline (OXERA Agenda 2005: 2), however it has failed to provide the Commission with precise information in relation to removal of relevant provisions from *BAA*'s Articles of Association (European Commission IP/04/17). It is necessary to emphasise however, that even without removal of relevant provisions from *BAA*'s Articles of Association, following GS redemption the said provision effectively lost its dissuasive powers since there was no longer a special shareholder holding special rights. Therefore it could be concluded that the GS provision contained in *BAA*'s Articles of Association retained no significant impact on the compliance obligations stemming from the judgment on case C-98/01.

On 7 January 2004, two months following the redemption of *BAA*'s GS, the EU Commission started infringement proceedings for non-compliance issuing a formal letter under what is now Article 260 TFEU and reminding the UK of its obligation to comply fully by removing relevant GS provisions from company's Articles of Association (ibid). The full compliance has been established on 27 July 2004 when *BAA*'s AGM has deleted GS provisions from the company's Articles of Association (European Commission IP/04/1234). Here it is pertinent to emphasise that following the redemption of *BAA*'s GS the company indeed fell victim to a foreign takeover (Financial Times 10/07/2006), and this fact clearly indicates that

GSs effectively dissuaded foreign investors while GS removal ‘paves the way’ (House of Commons 14/03/2008) to cross-border capital movements.

Following the judgment on *BAA*’s GS the government continued to redeem GSs held in strategic companies while in other instances it chose to re-nationalise some earlier privatised companies (European Commission, SWD (2005): 17-18). It is sufficient to note that the government retained GSs in defence companies such as *Rolls-Royce* and *British Aerospace*. The latter GSs could be justified on the grounds of public security and overriding requirements of the general interest. Proportionality and legal certainty of such GSs could have been contested, however it is highly unlikely that the Commission would test the legality of GSs in such sensitive areas (Cocciolo, Padrós 2010: 47).

3.E: Concluding Remarks

As the core enforcement effectiveness hypothesis suggests, the necessity to resort to the second round enforcement action under Article 260 TFEU points to weakness of the initial infringement proceedings under Article 258 TFEU. The initiation of the penalty enforcement mechanism would also imply that the supporting hypothesis on effectiveness of minimalist compliance ‘by amendment’ (H1a) could also be confirmed. However, this was not the case with the UK’s compliance with GS judgment. The UK case demonstrates how all of the compliance instruments available to the Commission were effectively applied for persuading the MS to shift to comprehensive compliance. It could be concluded that the present case represents one of the examples of compliance in good faith and there are two reasons for that. Firstly, despite the application of penalty procedure under Article 260 TFEU, the UK government has effectively complied within six months following the judgment, which signifies that the enforcement mechanism of Article 258 TFEU has been successful in facilitating compliance. Consequently both hypotheses questioning the effectiveness of enforcement system (H1 and H2) are falsified. Secondly, the infringement procedure coupled with condemning judgment and penalty threats have facilitated a comprehensive compliance also triggering the significant policy shift in attitude towards GSs. The government could have retained other GSs since the ruling on case C-98/01 did not oblige redemption of any other of such measures. Nevertheless the government has actively redeemed other GSs, which represents comprehensive compliance both with the judgment and with the

EU Treaty. Since the UK government shifted its policy and wider attitude towards GSs, the hypothesis questioning the effectiveness of the policy-setting case-law (H3) is not confirmed. Interestingly enough, the prominence of the UK's compliance is in spite of the penalty procedure for non-compliance which appears to have been applied prematurely, since the government has complied almost immediately by redeeming BAA's GS. The full redemption of GS reveals compliance in good faith, despite the initiation of penalty procedure. In this regard, it could also be noted that the UK government's failure to promptly communicate the amendments to the Commission constitutes a breach of obligations under Article 4(3) TEU (though not as grave infringement as non-compliance with the judgment).

The prominence of shift towards compliance could be attributed to the fact that the proceedings and the ruling resonated well with the ongoing domestic political and economic reforms regarding existing GSs. Prior to the infringement proceedings and at the time when the action was still pending before the CJEU, the government redeemed many of its GSs while clearly indicating that it wishes to redeem other such measures and to make sure that any existing rules duly comply with EU law. The continuous use of GS measures went against the UK's competition-centred and shareholder-oriented model of neo-liberal economy. Therefore, the government has not resorted to non-compliance, neither had it tried to justify BAA's GS with new amendments nor shifted to minimalist compliance. The minimalist compliance hypothesis is not applicable this case, as the sole compliance 'by repeal' resulted in the full and effective compliance. It is pertinent to emphasise that despite the fact that second round enforcement action has been applied, the UK GS case demonstrates that the first round procedure has been a success. Yet, when assessing compliance in this instance, it should be remembered that the UK had a clear advantage as its GSs were introduced significantly earlier than elsewhere within the Union and ahead of the initial concerns raised by the Commission on these measures. This leadership allowed the UK to successfully exploit GSs measures in full for the entirety of desired period, which could be one of the reasons why the enforcement action has triggered comprehensive compliance.

4. France: Compliance of a ‘*Dirigiste*’ Member State

This sub-chapter analyses compliance with judgment on case C-483/99 *Commission v France*. It begins with a short introduction on the background for GSs’ implementation, revealing the moderated necessity for these protectionist measures. It continues with the substance of GSs, the infringement procedure and analysis of the compliance measures, assessing whether France has complied in accordance with the good faith principle.

4.A: Introduction on Jurisdiction and its Golden Shares

Firstly, it should be noted that France (together with Germany and the UK) is the most influential MS within the EU and has long been the driving force behind European integration and the development of the free market (Drake, Lequesne 2010: 38; Kassim 1997: 170-1). Secondly, France is long known for its multi-level interventionism in strategic industries or so-called *dirigisme*, which saw the government playing a central part in control of companies which provided services of general public interest, the so-called *service public* (Bauer 1989; Schmidt 2002: 81). The function of the *service public* concept, in the words of Schweitzer, was not to delimit state activity, but rather to make the public interest its binding goal (Schweitzer 2011: 14). The French *dirigisme* has been strengthened by an intricate web of CEM’s, which allowed for effective defences from hostile takeovers (Gardner 1992; Carle 2007).

In 1986 France began privatisation, which first appeared to be as ambitious as in the UK (Schmidt 2002: 81; Vickers, Wright 1989: 1), yet the former privatised only profitable companies which operated in competitive markets (such as banks and insurance companies) – neither strategically-important companies that provided public service, nor monopolies were privatised at that time. In fact, the French privatisation Law/1986²⁸³ prohibited privatisation of strategic companies if that could undermine national interests (Turrini 1993: 817). The Law/1986 restricted foreign acquisitions to 20% of shares initially made available for sale (ibid; Billot, Echard 1993: 407). Likewise in order to protect national interests the Law/1986 granted the government with right to implement GS (*action spécifique*). French GSs had the same structure as the UK measures – special rights were attached to single

²⁸³ Law No.86-912 of 6/08/1986 on the Procedure for Implementing Privatisation Determined by the Law No. 86-793 of 2/07/1986 *Journal Officiel de la République Française (JORF)* 7/08/1986.

action spécifique held by the government. Pursuant to Law/1986 any implemented GS would be effective for five years, following which it would be permanently converted back into a common share. The imposition of relatively short application period signifies that the government perceived *action spécifique* as being a temporary mechanism. Effectively, the GS provision of Law/1986 has been fashioned with the view to facilitate future privatisations of *service public* and in 1993 it has been amended by new Law/1993²⁸⁴ which facilitated such privatisations.

The Law/1993 introduced several amendments to the previous regime, widening the scope of GS which now specifically applied to foreign acquisitions in companies which operate in strategic sectors, or *service public*. Firstly, the 20% ownership ceiling on initial foreign acquisitions no longer applied to EU investors. Pursuant to Law/1993 special rights attached to GS could include the right of *ex ante* approval of acquisitions above certain thresholds, the right to appoint two non-voting state representatives on the company's boards and the right to oppose decisions on disposal of assets if such decisions are likely to affect national interests. Two of the latter rights were absent from the 1986 provisions. Pursuant to Law/1993 any acquisitions which went through without approval would be stripped of corresponding voting rights and the acquirer would have to dispose of such shares within three months, otherwise a forced sale shall be executed. Secondly, Law/1993 introduced another major amendment which applied specifically to foreign investors: the approval was now required for foreign acquisitions exceeding a 5% shareholding ceiling in companies whose main activities fall within the ambit of the exercise of government's official authority on grounds of public policy, public security, public health and national defence. Thirdly, the period of applicability of GSs was amended: instead of minimal term of five years any GS would be time-unlimited and could be removed at any time.

The content of 1993 amendments signifies the French government's intention to possibly employ *action spécifique* for future privatisations of *service public*. The GS provisions of Law/1993 are not *per se* incompatible with the Treaty, since it merely allowed for implementation of further decrees, activating *action spécifique*. Even though Law/1993 itself did not contain any specific conditions for exercise of GSs (apart from the broadly defined necessity to protect national interests), further company-specific decrees could have clarified under which circumstances the

²⁸⁴ Law No.93-923 of 19/07/1993 (*JORF* of 14/12/1993).

special rights would be applied (Turrini 1993: 828). However, as the case on contested French GSs shall demonstrate, these decrees would fail to bring any further legal certainty.

For the purpose of this overall introduction it should be emphasised that France chose not to completely privatise many of its strategic companies, retaining significant shareholdings in companies such as *EdF* (Kassim 1997: 177; Maclean *et al* 2007: 539; Charbit 2001: 134). France has a relatively concentrated system of share ownership and ownership of major companies is largely concentrated around preferred investors, creating a ‘stable core’ of loyal shareholders (Morin 2000; Maclean *et al* 2007; Billot, Echard 1993: 408). Ownership concentration coupled with intricate web of CEMs, allowed for increased protection from hostile takeovers (Gardner 1992; Carle 2007). Additionally, as Conway *et al* (2008: 639) puts it, the concept of shareholder primacy enjoys no obvious legitimacy in France. In this respect, French companies were in favourable situation on the matter of protection against hostile takeovers, especially comparing to situations established in the UK, where the government refrained from retaining public ownership and companies quickly become targets for foreign acquirers (Haar and Jones 2008: 2611).

It is also sufficient to note that when it comes to compliance with EU law France is one of the ‘top laggards’ when compared to EU average (Börzel 2001: 819; Tallberg, Jönsson 2001: 26). Taken its significant political power, high administrative capacity and its overall compliance record France could also resist compliance when it comes to GS judgments.

4.B: Early Concerns and the Infringement Procedure

Initially, the French privatisation law has been drafted under the close scrutiny of the EU Commission (Turrini 1993: 820). The Commission quickly became alarmed about explicitly protectionist measures, threatening to sue France in case if the Law/1986 and its 20% foreign ownership ceiling were implemented.²⁸⁵ Even though the imposition of the foresaid ceiling explicitly violated the fundamental freedom of establishment, the Commission decided not to criticise but to reach an agreement with France, thus acting in good faith towards this MS.²⁸⁶ In return the French government promised not to apply the 20% ceiling to EU residents (Turrini 1993: 820). As the amendment of 1993 clearly demonstrates, the government kept to

²⁸⁵ Law No.93-923 of 19/07/1993 (*JORF* of 14/12/1993).

²⁸⁶ *Ibid* at 820.

its promise and revised the provision which no longer applied to EU investors. However, the 1993 provision extended the special rights also introducing a new ownership ceiling which applied to all investors. The Commission remained silent for six months, up until the provisions of Law/1993 have been activated by further company-specific decree²⁸⁷ creating an *action spécifique* for energy giant *Elf-Aquitaine (Elf)*. This GS was later said to be used as a threat to prevent a hostile takeover by its French rival *Total*.²⁸⁸

Elf-Aquitaine was one of the largest energy companies in France, becoming the first company to be protected by what was later said to be ‘the most extensive GS’ (Les Echos 14/12/1993). The government chose to fully privatise *Elf*, retaining a single *action spécifique*. *Elf*’s GS implemented all of the available options provided by Law/1993 – granting the government with the following rights: to issue *ex ante* approval on acquisitions by any investor of shares in excess of 10%, 20% and 33% of the company’s capital or voting rights, to appoint two non-voting representatives to the company’s Board of Directors and to veto the transfer of (or use as security) the majority of capital of *Elf*’s subsidiaries (European Commission IP/98/1058). Pursuant to *Elf*’s Decree, anyone wishing to acquire assets exceeding one of the set thresholds would have to submit documents to the government which could oppose the acquisition within one month or approve it by silence. Transactions which proceeded without prior approval would have been annulled.

Elf’s Decree has attracted the Commission’s attention and in May 1998 it has formally notified France of the alleged breach.²⁸⁹ France replied in a timely manner stressing that the Treaty does not preclude the government from ensuring the continuity of national energy supply. French authorities have also expressed willingness to amend the contested GS. The Commission was not satisfied with the proposed amendments and has issued a reasoned opinion on 18 January 1999. In less than a month France issued a draft amendment of *Elf*’s Decree which sought to justify application of approval regime, stating that it would be applied only if pending acquisition ‘might threaten to disrupt France’s supplies of petroleum products’.²⁹⁰ The government further supported its case in a note sent to the Commission on 19 April 1999 clarifying that protection of *Elf* from a non-EU

²⁸⁷ Decree No.93-1298 of 13/12/1993 (*JORF* of 14/12/1993, p.17354).

²⁸⁸ European Commission, SWD (2005), *supra* note 25, p.9&14; on takeover see GRIFFITHS (2001); *The New York Times* (6/07/1999).

²⁸⁹ See relevant paragraphs of case C-483/99 *France*, note 52.

²⁹⁰ *Ibid*, para.14.

acquirer is the matter of national importance since it is vital for safeguarding national economy in general and energy supplies in particular. The Commission did not accept France's amendments and arguments bringing the matter to the CJEU.

The Commission claimed that even though *Elf's* approval regime applies to all market participants it represents an obstacle for capital movement which cannot be justified due to the lack of legal certainty.²⁹¹ The Commission concluded that *Elf's action spécifique* could be justified by the overriding reasons to ensure continuity of petroleum supplies in the event of a crisis, however it is not proportionate to the objectives pursued which could be attained by less restrictive measures.²⁹² France agreed that *action spécifique* restricts capital movement, but has argued that since they are non-discriminatory and imperative for protection of national interests they 'constitute a necessary adjunct to the international measures'.²⁹³ France insisted that *Elf's* GS satisfies the proportionality requirement and is justified by the necessity to guarantee public security as laid down in the Treaty and by overriding requirements of general interest.²⁹⁴ Contrary to the Commission's claims the government argued that there are no adequate and less restrictive alternatives to GS both at the national and EU levels.²⁹⁵

On 3 July 2001 the European advocate delivered his opinion, concluding that *Elf's action spécifique* does not violate the Treaty and is 'required by the economic reality of the various sectors of activity subject to the privatisation' (Advocate General 2001: paras.31-72&90-1). The CJEU, however, sided with the Commission establishing that the measures in question lack on legal certainty, are disproportionate to the objectives pursued and leave the government with wide discretionary rights (ibid, paras.47-52). The CJEU rightfully ruled that *ex ante* approval could be substituted by the less restrictive *ex post* measures (ibid, para.46). On 4 June 2002 the Court delivered its judgment condemning *Elf's* Decree which implemented *action spécifique* and its approval regime. Interestingly enough the Court did not challenge the provision of *Elf's* Decree which allowed the government to appoint representatives to the company's board. France's compliance initiative and the reasons behind its shift to comprehensive compliance will be analysed in the following section.

²⁹¹ Case C-483/99 *France*, note 52, para 20.

²⁹² *Ibid*, paras.24-5.

²⁹³ *Ibid*, paras.29&39.

²⁹⁴ *Ibid*, paras.27-31.

²⁹⁵ *Ibid*, paras.32-33.

As a preliminary point it should be noted that when GSs were implemented and challenged by the CJEU, France did not have considerable motives to resist subsequent compliance, since other effective contra-takeover mechanisms could effectively substitute repealed GS. Moreover the GS has been applied solely for *Elf* and the enabling provisions of the Law/1993 have not been challenged by the CJEU, so following the condemning judgment they could remain intact.

4.C: Comprehensive Compliance

Firstly, France's good natured conduct at the time of the Commission's early concerns should be emphasised. Back in late 1980's the government negotiated with the EU authorities and in good faith has adjusted its GS provisions as demanded by the Commission: the 20% ownership ceiling no longer applied to EU investors. Likewise the new 5% ownership ceiling applied specifically to foreign investors and only to companies with activities linked to public health, security and defence. This provision did not automatically cap foreign investments at 5%, instead requiring for approval for acquisitions to be valid. The above amendments signify that the government sought to make *Elf*'s GS compatible with the Commission's demands, while at the same time allowing for adequate protection. The elimination of a mandatory five year applicability period, found in initial Law/1986, could signal that France was aiming to employ its GS for no longer than strictly necessary. However the time-unlimited provision of new Law/1993 could also appear to be less defined, as the GS now could be applied for more than five years, so the increased transparency of the measure in this regard is of debatable nature.

Secondly, France's conduct during infringement procedure clearly demonstrates that it has genuinely cooperated: it has not only replied to all of the Commission's correspondence but replied in a timely and comprehensive manner. France's reply to the reasoned opinion arrived within one month and contained not only defensive arguments, but also a draft amendment of contested measures. The government went on to further clarify its position with a complementary note, emphasising the importance of ensuring the security of petroleum supplies for its national economy and security. These amendments and arguments were not enough to satisfy the Commission, but then again France has been cooperating in good faith, in spite of its prominent belief that *Elf*'s Decree is genuinely compatible with the Treaty. Interestingly, France's position on compatibility of the measures has been

also re-indorsed by the opinion of the European advocate on the case, which has criticised the Court's approach to analysis of the GSs.²⁹⁶

Thirdly, and most importantly, France's post-judgment conduct should be analysed. It should be emphasised that at the time of the condemning judgment the government was getting prepared to fully comply: adequate compliance measures were implemented shortly following the judgment. The relevant compliance Decree²⁹⁷ has entered into force on 5 October 2002, permanently repealing *Elf's* Decree which implemented *action spécifique*. The government did not pursue to amend its contested law, neither to delay full compliance. Instead it has complied fully within three months following the judgment, which constitutes compliance in good faith. However, the legal basis for GS implementation, namely privatisation Law/1993, remained in force. On the basis of Law/1993 two further *action spécifique* were implemented in defence and aerospace companies: one in 1997 for Thomson (now Thales)²⁹⁸ and in 1999 for *Aerospatiale*.²⁹⁹ Here it should be emphasised that even though GSs in such sensitive industries could be justified and were unlikely to be challenged by the Commission, in 2000 the French government chose to permanently transform³⁰⁰ *action spécifique* back into common share in case of *Aerospatiale*.

In October 2002, following compliance with the judgment, the government issued a statement concluding that the judgment of the CJEU on *Elf's* Decree 'should not, however, have important consequences'.³⁰¹ This is due to the existence of further post-privatisation protectionist devices, which have promoted France's comprehensive compliance in good faith. Firstly, France still had the ability to control foreign acquisitions in strategic industries post-privatisation, which stems from Law/1993 – setting a 5% foreign ownership ceiling in companies operating in public health, security and defence. Secondly, Law/1993 allowed the government to concentrate the ownership around preferred investors and this mechanism could be perceived as superior to the GSs (Grundmann, Möslin 2003: 6). This concentration

²⁹⁶ Advocate General (2001), Opinion of the AG Colomer in Cases C-367/98, C-483/99 and C-503/99, *Commission v Portugal, France and Belgium*, delivered on 3/07/2001, published at [2002] 2 *CMLR* 48, paras.31-72&90-91.

²⁹⁷ Decree No.2002-1231 of 3/10/2002 (*JORF* of 5/10/2002).

²⁹⁸ Decree No.97-190 of 4/03/1997 (*JORF* No.54 of 5/03/1997).

²⁹⁹ Decree No.99-97 of 15/02/1999 (*JORF* No.39 of 16/02/1999).

³⁰⁰ Decree No.2000-630 of 7/07/2000 (*JORF* of 9/07/2000).

³⁰¹ L'Etat Actionnaire Rapport (2002), Rapport remis au Parlement et au Haut Conseil du secteur public en application de l'Art 42 de la loi sur les nouvelles régulations économiques, pp.1-45, p.12-13.

of ownership around loyal shareholders allowed for increased protection against unwelcome takeover bids.³⁰² Thirdly, in many cases France chose to retain controlling stakes in many of its strategic companies to guarantee effective control.³⁰³ The existence of other effective CEMs which interlocked preferred investors in intricate web of cross-shareholdings, also allowed for effective control post-privatisation (Bauer 1989: 56; Rhodes, Apeldoorn 1998: 411). Due to availability of all of the foresaid mechanisms, the government could comply with the judgment on *Elf's action spécifique* in case C-483/99 without delay.

The consolidation strategy practised in France could be another reason for timely and appropriate compliance. In contrast to the UK's desire to break-up its large companies, France promoted national champions through domestic takeovers and mergers – an approach later employed by Spain and Italy (Schmidt 2002: 189). France sought to strengthen the position of its former SOEs – consolidating companies by increasing their competitiveness via mergers and takeovers, so that application of *action spécifique* mechanism would be no longer needed in the future.³⁰⁴ A great example of the government's policy towards consolidation could be seen in case of *Elf's* takeover by its national rival *Total*, bringing *Elf's action spécifique* to the front lines of the world's press (Financial Times 1/08/1999). The government implicitly approved this takeover since it would create an effectively takeover-proof national champion.³⁰⁵ By the time the case got referred to the CJEU, *Elf* was already on the way to consolidation. By the time of the ruling on GS case the French government was fully prepared for compliance as *Elf's action spécifique* was no longer needed – the takeover by *Total* was already under way (European Commission IP/00/135).

Elf's GS has never been used, but its challenge by the Commission and the CJEU has prompted France to change its approach towards this measure. For example, the French government has referred to the judgment on *Elf's* Decree when drafting *action spécifique* for *Gaz de France* in order to be certain that the new provisions would comply with the Treaty.³⁰⁶ Similarly to the UK's compliance, the

³⁰² See OECD (2003), *supra* note 25, p.113.

³⁰³ *Ibid*, p.114-15.

³⁰⁴ For example, French utility company *Suez* has been persuaded not to accept a takeover bid from Italian *ENEL* but instead to accept a deal with French company *Gaz de France*, see SEC(2007)1024, *supra* note 69.

³⁰⁵ L'Etat Actionnaire Rapport (2002), *op. cit.*, p.14; *The Times* (29/07/1999), p.31.

³⁰⁶ Sénat, Projet de loi relatif au secteur de l'énergie, Titre III – Dispositions relatives au capital de Gas de France et au Contrôle de l'Etat, at: <http://www.senat.fr/rap/106-006/106-00618.html>

French example demonstrates how the infringement procedure has triggered a shift to comprehensive compliance. The prominence and promptness of implemented measures appear to be even more in line with the good faith principle than the UK's compliance measures, since the Commission had not been forced to initiate infringement proceedings for non-compliance with the judgment on French GSs.

It should be emphasised that both the UK and France were pioneers in privatisation and GS implementation – this time-lag allowed for timely adjustment to the challenges brought by liberalisation of strategic industries and establishment of the free market thereof. However, when assessing the new provisions of 1993 *action spécifique* some commentators prematurely praised privatisations in Italy and Spain, claiming that these countries abstained from introduction of GSs while the UK and France did not (Turrini 1993: 819). In contrast to this statement, the analysis revealed that when it came to implementation of GSs and subsequent compliance with the judgment in the foresaid MSs, France could be seen as a leader for implementation of relatively viable GSs and for compliance in good faith post-judgment.

France's comprehensive compliance is even in sharper contrast when compared with Italian or Spanish minimalist compliance strategies which often did not end the violation themselves but prescribed implementation of potential justifications. In Italian and Spanish 'anti-EdF' and 'anti-E.ON' cases the protectionist measures were the ones to be rapidly implemented but not the compliance measures, which were fidgeted with, procrastinated and defied compliance.

4.D: Concluding Remarks

Despite the country's comparatively poor compliance record, France's approach to GSs issue stands out as an exemplary case of compliance in good faith. Prior to this judgement the CJEU had issued only one judgment on Italian GSs in 2000, so the EU institutions have not yet established a clear-cut position on the issue. Still, France has comprehensively complied in good faith. Even though France has maintained other GSs (in defence and aerospace companies) which could potentially be justified and were unlikely to be challenged in the first place, it has 'seen the light' and repealed some of these GSs measures. To summarise: the French government's compliance measure with the GS judgment could be seen as

particularly adequate, transparent and permanent compliance initiative which does not allow for further compliance procrastinations, amendments or justifications – the compliance is therefore absolute and paramount. All what was necessary to persuade France to comply and repeal GSs was an infringement procedure and a single judgment. Consequently, since the core enforcement effectiveness/obstructionist hypothesis of this study (H1) is falsified, the supporting hypothesis on effectiveness of minimalist compliance (H1a) and second enforcement effectiveness hypothesis (H2) are not applicable in this case. The French GS case falsifies the hypothesis on effectiveness of the agenda-setting case-law (H3).

In conclusion it suffices to note that France has complied only after the protected company *Elf* has been consolidated becoming a takeover-proof national champion. The purpose of the GS has been achieved, and hence it was no longer needed. The judgment fitted well into national policy on GSs, which allowed the government to shift into comprehensive compliance.

5. Belgium: Setting up the Criteria for Justification

This sub-chapter analyses the judgment on Belgian GSs on case C-503/99, delivered on the same day as the French ruling. The significance of this case stems from the fact that to this day it remains the only instance when GSs have been justified. Since analysis of the post judgment behaviour is not applicable in this case, the sub-chapter will assess the pre-referral compliance initiatives which eliminated the excessively protectionist provisions of Belgian measures, revealing how GSs ought to be structured in order to be justified and which other factors could contribute towards their justification. It begins with a short introduction of Section 5.A which is necessary for understanding why GSs were of limited importance for the said MS. Section 5.B reveals the substance of GSs. Section 5.C analyses these GSs in light of the subsequent compliance measures, which signified Belgium's intention to comply with the Treaty in good faith. The concluding analysis of Section 5.D will compare Belgian measures against GSs already discussed in this study.

5.A: Introduction on Jurisdiction and its Golden Shares

Similarly to the French *dirigisme*, Belgian government is known for its interventionist approach to strategic industries (Hermann, Verhoest 2012: 12; Drumaux 1989: 72). Belgium engaged only in partial privatisations which had a limited impact on government interventionism due to unique mixed public-private economy, characterised by companies in which ownership is shared between both public and private investors (Drumaux 1989: 72). The government commonly retained majority stakes in privatised companies, controlling them by means of indirect ownership (ibid). Strategic companies operating in energy sector mainly remained under state- or joint public-private ownership (Clifton *et al* 2006: 750). Apart from continuous indirect state-participation in the capital of privatised companies Belgium is known for widespread use of powerful CEMs which protect companies from unwelcome takeovers.³⁰⁷ Additionally, the government has implemented the EU Takeover Directive in a protectionist way, making it difficult for foreign investors to launch hostile takeovers (Mukwiri 2009: 113).

³⁰⁷ Report on the Proportionality Principle in the European Union (2007), pp.43-52; also FACCIO, LANG (2002), p.366; OECD (2007) Lack of proportionality between ownership and control: overview and issues for discussion; see also RENNEBOOG (1996).

Taking into account the effectiveness of all of the above protectionist measures it should be stressed that strategic businesses in Belgium have experienced a large degree of protection, thus additional safeguards, such as GSs, were of limited importance. However, purchases of stock by foreign investors in listed companies that provide services of general public interest raised important questions of national security prompting the government to allow for implementation of GSs.

The Ownership Disclosure Law of 1989³⁰⁸ applied to publicly listed companies, obliging investors to disclose (notify) to the government significant acquisitions or disposals of shareholdings in excess of particular thresholds. The ownership threshold for this purpose has been set at 5% of the total existing voting rights, and it could be further reduced by corporate statutes of the relevant company to 3%. On the basis of the enabling Law/1989 the government created notification and approval regime by means of further company-specific decrees in three strategic companies: gas distribution companies *SNTC* and *Distrigaz* and nuclear energy company *Synatom*.³⁰⁹ The EU Commission did not put to the scrutiny the GSs held in *Synatom*, whereas GSs in two other companies became subject to the CJEU's judgment analysed below.

For the completeness of this overall introduction it should be noted that Belgium is one of the MSs that demonstrates significant level of non-compliance with the EU law (Börzel 2001: 819).

5.B: Golden Shares and a Right of Retrospective Opposition

The company-specific Decrees of 16th and 10th of June 1994 created GSs in *Distrigaz* and *SNTC* respectively. *Distrigaz* is a company which has exclusively distributed gas in Belgium and its strategic assets comprise of infrastructure for the domestic conveyance and storage of gas.³¹⁰ *SNTC* is a network utility which exclusively owns and services the systems of national gas pipelines and conduits, which constitute major infrastructure for the domestic conveyance of energy products.³¹¹ In accompanying document to the *Distrigaz* Decree (*Distrigaz* Report) the government stressed that following the privatisation of state-controlled

³⁰⁸ Law of 2/03/1989 Royal Decrees of 10/05/1989, also RENNEBOOG (1996).

³⁰⁹ Royal Decree instituting a golden share in *SNTC* – 10/06/1994, (MB of 28/06/1994); in *Distrigaz* – 16/06/1994, (MB of 28/06/1994); in *Synatom* – 10/06/1994, (MB of 28/06/1994).

³¹⁰ Case C-503/99 *Belgium*, note 53, para.28.

³¹¹ *Ibid.*

shareholdings, it is essential to create a balance between the change of ownership in the relevant sector and the need for continuous state control.³¹²

Essentially, the government justified GSs in *Distrigaz* on the basis that the company has exclusive rights for the inland transportation and storage of gas on Belgian territory and national interests demand that continuous state control by means of GS or *action spécifique* is ensured. The government emphasised that the *action spécifique* is a contemporary instrument of public control which is commonly used in other MSs (such as the UK, France and Italy) also stressing that Belgian GSs differ from other such measures.³¹³ The government further maintained that *action spécifique* shall be maintained specifically in public utility companies and the control over *Distrigaz* would be exercised in the interests of society and national energy policy.

The *Distrigaz* Decree of 16 June 1994 provides that one *action spécifique* is sold to the state with the special rights reserved for the Minister of Energy. The share could not be disposed without prior legislative authorisation and the special rights are effective for as long as the share remains property of the state. GS created a special mechanism which would allow the state to control significant transfers of securities which could result in change in the ownership of *Distrigaz*. For attainment of the foresaid objective, firstly, the *Distrigaz* Decree established a system of notification for transactions in company's shares, allowing the Minister to oppose any such operation if it 'might adversely affect national interests' in the energy sector. This provision effectively allowed the government to intervene in company's shareholding structure and it was essentially based on the Ownership Disclosure Law of 1989. Secondly, the *Distrigaz* Decree grants the Minister the right to oppose certain transactions involving 'strategic assets' and establishes a system of prior notifications. The Minister would have the right to oppose any transfers, use as security or change in the strategic assets of *Distrigaz*, within twenty one days if he/she considers that such transaction could adversely affect the national interests in the energy sector. The strategic assets were listed in the Annex to the *Distrigaz* Decree and included infrastructure for inland transportation, storage and supply of gas.

³¹² See 'Report to the King' (*Rapport au Roi*) of the *Distrigaz* Decree, *supra* note 309.

³¹³ *Ibid.*

Thirdly, the *Distrigaz* Decree reserved a special right to the Minister to appoint two representatives of the government to the directors' board, who shall also sit on the Executive Committee. These representatives served in advisory capacity with no voting rights, yet they could appeal to the Minister against any decision of the board or Executive Committee if they consider such decision being contrary to the guidelines on national Energy Policy, including the government's objectives relating to country's energy supply. The appeal to the Minister could be evoked within four working days of the meeting at which the relevant decision was adopted or of the date on which the representatives learned of its adoption. The Minister then could annul the adopted decision within eight working days.

In addition to the above special rights, at the time when shares of *Distrigaz* were publicly listed, a further *Distrigaz* Decree of 20 July 1994³¹⁴ widened GSs established by the Decree of 16 June 1994. According to the accompanying Report on the *Distrigaz* Decree of 20 July 1994, the system of prior notification established by Decree of 16 June remains in force for listed shareholdings. However, due to 'anonymity' of the traded shareholdings it is desirable to further establish an ownership ceiling on acquisitions. The Decree of 20 July established a limitation of a number of shares which could be acquired by any shareholder. The accompanying Report to the *Distrigaz* Decree of 20 July 1994 further clarified that the objective of this ownership ceiling compliments the desire of the government to distribute a significant stake in *Distrigaz* among public and private institutional investors.³¹⁵ Therefore, similarly as in the French case, the provision of Belgian ownership ceiling aimed at establishment of 'stable core' of shareholders (Verhoeven 1996: 885). In case of *Distrigaz* the ownership ceiling has been set at 3% of the total voting rights: no one could acquire listed shares if such acquisition would result in voting rights ownership in excess of a 3% threshold.³¹⁶ According to the *Distrigaz* Decree of 20 July 1994 any voting rights attached to the shares acquired in excess of that limit would be automatically suspended.

³¹⁴ Royal Decree on the acquisition of publicly traded shares of *Distrigaz* of 20/07/1994, (*M.B.* of 30/07/1994).

³¹⁵ See *Rapport au Roi* of the Royal Decree on the acquisition of publicly traded shares of *Distrigaz* of 20/07/1994, *op. cit.*

³¹⁶ Article 1(1) of Royal Decree of 20/07/1994, *op. cit.*

As regards the *action spécifique* created for *SNTC*, the accompanying Report³¹⁷ to the *SNTC* Decree of 10 June 1994 provides that the special rights should enable the government to assume the coordinating role in the construction and expansion of pipelines and conduits necessary for the domestic conveyance of energy products. The *SNTC* Report further provides that this controlling role of the government is of interest to the national energy policy insofar as it relates to major infrastructure for the domestic conveyance of energy products or pipelines and conduits which could be used for this purpose. Due to the above reasons, the government sought to continue to exercise some degree of public control following the privatisation of *SNTC*. The *action spécifique* mechanism created for this purpose is tantamount to the one created for *Distrigaz*, yet there are several differences between the *Distrigaz* and *SNTC* regimes.

Firstly, in case of *SNTC* the notification regime granting the Minister with the right of opposition of certain operations applies not to ‘strategic assets’, but to operations involving company’s system of pipelines and conduits, promptly listed in a separate document. As in case of *Distrigaz* the Minister can oppose such operations within twenty one days if it could adversely affect the national interests in the energy sector. Secondly, the notification regime grants the Minister with the right of opposition on operations by which a natural or legal person acquires 5% or more of the capital or voting rights of *SNTC*, or increases his holding in such a way as to control 10% or more of the capital or voting rights.³¹⁸ Lastly, the *SNTC* Decree grants the Minister with appointment rights, but applies only to appointments to the company’s Board of Directors and not to Executive Committee.

As one can observe from the special rights which applied both to *SNTC* and *Distrigaz*, the GSs provisions allowed the government to exercise control via numerous mechanisms: ownership ceilings, right to *ex post* opposition for certain transactions and right to appoint representatives to companies’ boards. Even though, similarly to French GSs, Belgian *action spécifique* applied without distinction to all investors, some of the special rights were of excessively restrictive character. In particular the system of notification of significant transfers of *SNTC* and *Distrigaz* shares and the relevant right to Ministerial opposition is not subject to any condition, apart from the fact that opposition could be exercised on decisions which ‘might

³¹⁷ See *Rapport au Roi* of the Royal Decree instituting a golden share in *SNTC* reserved for the government of 10/06/1994, *supra* note 309.

³¹⁸ Article 2(2) of *SNTC* Decree, *supra* note 309/309.

adversely affect national interests' in the energy sector. Likewise, the provision on *Distrigaz* Decree of 20 July 1994 which established ownership ceiling at 3% is of highly deterrent effect, as well as the 5% and higher ownership ceilings applicable to *SNTC* shareholdings. These provisions attracted the EU Commission's attention which sought to intervene.

5.C: The Infringement Procedure

On 8 July 1998 the Commission services formally notified Belgium on the alleged breach of the fundamental freedoms of capital movement and establishment.³¹⁹ The Commission's primary concern was the notification regime for acquisitions equal to or exceeding certain ownership thresholds (European Commission IP/98/1135). Belgium replied to the formal letters in a timely manner, stating that the special rights have not been exercised, are not of discriminatory character and shall not be applied in a discriminatory manner.³²⁰ Belgium further expressed its inclination to revise the GSs and to inform the Commission of any cases when the special rights of *action spécifique* are going to be applied as well as the objective of their application (European Commission IP/98/1135). Unpersuaded, the Commission issued two reasoned opinions on 18 December 1998 allocating two months for compliance. On 4 March 1999, later than the compliance date stipulated in the reasoned opinions, Belgium replied with a single letter stating that it intends to amend special rights of *action spécifique*.³²¹

The government stood by its promise, and shortly following the reply to the reasoned opinions repealed its most controversial GS provisions by the Law/1999.³²² Firstly, the government repealed the provisions of *SNTC* and *Distrigaz* Decrees of 16 and 10 June 1994 respectively, which concerned share transfers and had established the notification regime alongside the Ministerial right to oppose such transfers.³²³ Secondly, the Law/1999 established that further decrees shall define non-discriminatory and transparent objectives for exercise of the special rights attached to *action spécifique* under the *SNTC* and *Distrigaz* Decrees.³²⁴ Thirdly, the Law/1999 repealed the *Distrigaz* Decree of 20 July 1994, which established an

³¹⁹ Case C-503/99 *Belgium*, note 53, para.11.

³²⁰ *Ibid*, para.12.

³²¹ *Ibid*, para.14.

³²² Law of 29/04/1999 (*M.B.* of 15/06/1999).

³²³ *Ibid*, Article 29(1).

³²⁴ *Ibid*, Article 29(2).

ownership ceiling on acquisitions at a 3% threshold of the total voting rights and automatically suspended any voting rights for shares acquired in excess of that limit.³²⁵ Finally, the Law/1999 allowed for implementation of additional safeguards for Belgian energy supplies in cases of a threat of attack, a sudden crisis in the energy market, or in cases when the security of supply, safety and security of the persons, equipment, facilities, integrity of energy transmissions of the country would be under threat.³²⁶ In the above situations, after deliberation with the Council of Ministers and consulting the Belgian Commission for Energy, the government may issue a decree stipulating the necessary protective measures, which might include temporary derogations from the provisions of the Law/1999.

By repealing the most controversial special rights which could have had a deterrent effect on potential investors, the government has acted in good faith towards its obligations under the Treaty. However, the Law/1999 did neither address the right of appointments with its option for annulment of company's board decisions, nor the right of opposition to transactions both in *SNTC* and *Distrigaz*. The EU Commission therefore announced its intention to refer the matter to the CJEU, lodging an application on 22 December 1999.

In its application the Commission had challenged the provisions of *SNTC* and *Distrigaz* Decrees which granted the right to oppose certain transactions. According to the Commission, even though the special rights applied without discrimination, they were liable to impede, or render less attractive, the exercise of free movement of capital and establishment.³²⁷ The Commission argued that the right of opposition cannot guarantee adequate energy supplies, and could be attained by less restrictive measures, such as supply contracts and long-term planning.³²⁸ The Commission also referred to the EU harmonising legislation which concerned common rules for the internal market in natural gas, stating that Belgium could employ the provisions of this legislation to ensure the balance between competition and the objective of guaranteeing adequate supplies.³²⁹

During the litigation proceedings Belgium agreed that the *action spécifique* in two gas companies constitutes restrictions on the Treaty freedoms, yet arguing that the special rights reserved for the government are adequate and proportional to the

³²⁵ Law of 29/04/1999, *op. cit.*, Article 30.

³²⁶ *Ibid*, Article 23.

³²⁷ Case C-503/99 *Belgium*, note 53, para.20.

³²⁸ *Ibid*, para.24.

³²⁹ Energy Directive, *supra* note 103, case C-503/99 *Belgium*, para.25.

objectives pursued.³³⁰ Belgium argued that the aim of the notification regime is to keep the government duly informed, while the right to opposition relate only to very specific situations and is limited in time.³³¹ Same goes for the right to oppose certain resolutions of the companies' boards, as it could be applied only in very specific situations and is extremely limited in time.³³² Belgium argued that the measures of supply contracts and long-term planning cannot guarantee adequate safety for continuity of supplies, stressing that such a guarantee is vital for the survival of the public and the security of country's existence.³³³

After analysing measures at issue the CJEU agreed that *action spécifique* and its notification/opposition regime in *SNTC* and *Distrigaz* could be justified on the grounds of public interest and by the objective of guaranteeing the continuity of the energy supply in the event of a crisis.³³⁴ The Court distinguished that regime at issue is an *ex post facto* measure which does not necessary trigger an opposition by the government.³³⁵ The Court established that the regime applies to limited decisions concerning limited assets and only in cases of a threat to national energy policy objectives, while also being subject to effective judicial review.³³⁶ The Court also dismissed the relevance of the Energy Directive, since its implementation deadline was set in 2000 which is after the application to the CJEU has been lodged.³³⁷ In the light of the above findings, on 4 June 2002 the Court ruled that the Belgian GSs are justified and the Commission's application must be dismissed.

5.D: Analysis

During the course of the judicial proceedings Belgium introduced Decree/2000³³⁸ regulating the application of GSs in *SNTC* and *Distrigaz* which was based on Decree/1999, prescribing the implementation of decrees laying down the criteria for the exercise of special rights attached to *action spécifique*. The Decree/2000 was an urgent compliance measure driven by the need to establish objective, non-discriminatory and transparent criteria for the exercise of special

³³⁰ Case C-503/99 *Belgium*, note 53, paras.26&40.

³³¹ *Ibid*, para.28.

³³² *Ibid*.

³³³ *Ibid*, paras.30&33.

³³⁴ *Ibid*, para.55.

³³⁵ *Ibid*, para.49.

³³⁶ *Ibid*, paras.50&51.

³³⁷ *Ibid*, para.54.

³³⁸ Royal Decree of 5/12/2000 (*M.B.* of 20/12/2000).

rights attached to *action spécifique* held in *SNTC* and *Distrigaz*.³³⁹ This additional urgent compliance measure sought to address the judicial procedure initiated on 22 December 1999 as well as to comply with the forthcoming (possibly condemning) judgment of the CJEU. It is outside the limits of this study to analyse in detail the provisions of the Decree/2000, however some of the main features should be highlighted to emphasise Belgium's intention to duly comply by amending GSs so its application would be justified.

The Decree/2000 specified that the special rights of *Distrigaz* and *SNTC* may be exercised in order to: achieve opening of the gas market, guarantee the provision of public services and ensure secure and safe operation of equipment and stability of the transmission of natural gas. The Decree specified that special rights may be exercised in the general interest if energy policy so demands and only on the basis of objective, non-discriminatory and transparent criteria. The Decree/2000 further listed eight-fold criteria for the exercise of special rights in *SNTC* and *Distrigaz* in relation to particular facilities, while also laying down six-fold criteria which shall be taken into account for exercise of special rights.

The Decree/2000 reveals that the government sought to comply with the Treaty provisions prior to the judgment, clearly defining the objectives and instances for the exercise of GSs. These timely amendments could have proved to be adequate compliance measures in case if the contested GSs were to be overruled by the CJEU. Since the GSs were justified the foresaid pre-judgment compliance measure stands out for its appropriateness, revealing that Belgium is a MS which sought to comply in good faith. Likewise, in contrast to the Commission's observation that the Law/1999 has merely made some 'structural adaptations' (European Commission IP/98/1135), it could be argued that the Law has effectively scaled down the provisions of Belgian *action spécifique* legislation. It not only repealed the most restrictive provisions, but also provided for further legal certainty by disclosing the possible objectives for GSs application.³⁴⁰ The amendment of Law/1999 which repealed the ownership threshold ceilings found in the *SNTC* and *Distrigaz* Decrees, as well as the ownership ceiling of *Distrigaz* Decree of 20 July 1994, also reveals that Belgium was acting in good faith towards its obligations under the Treaty.

³³⁹ See the preamble to the Decree of 5/12/2000, *op. cit.*

³⁴⁰ Article 23 of Law of 29/04/1999, *supra* note 322.

Nonetheless, the situation on the GSs in *SNTC* and *Distrigaz* seems to be confusing due to the following chain of events.

The amendments to the GSs came after the date stipulated in the reasoned opinion: the compliance by the MS's own initiative could have been effectively achieved only before the two month period has lapsed.³⁴¹ The Law/1999 has entered into force on 15 June 1999, which is almost three months past the deadline stipulated by the two reasoned opinions of 17 December 1998. The Commission's approach to the GSs in *SNTC* and *Distrigaz* seems to be confusing since following the amendments of the Law/1999, instead of issuing complementary reasoned opinion (as it later did in case of Spanish GSs)³⁴² it pursued to proceed with the application to the CJEU by simply omitting the repealed provisions from the application to the CJEU. It is established case-law that the MS's compliance obligations must be determined by reference to the situation as it stood at the end of the period laid down in the reasoned opinion as the CJEU should not take account of any subsequent amendments to the contested measures. This was clearly confirmed by the CJEU in its first GS-related judgment on Italian case C-58/99.³⁴³ However, as the judicial procedure on Belgian GSs demonstrates, the EU Commission did not pursue to press Belgium on provisions repealed by Law/1999, only the right for opposition has been challenged. This also goes in contrast with the approach taken in the Italian GS case since if the Commission would have followed the above principle as applied in the said case, Belgian GSs might have not been justified, due to the highly deterring effect of the ownership threshold restrictions.

Of course the Belgian situation goes in sharp contrast with the Italian approach (assumed in relation to compliance with judgment on case C-58/99), since the latter only envisaged compliance at the time when the judicial stage was in its final phase and the resulting compliance measure was found to be inadequate. Similarly, Belgium's good mannered pre-referral compliance measure of Law/1999 coupled with pre-judgment compliance initiative of Decree/2000 stands out when compared to Spanish compliance approach, since the latter MS merely allowed its GSs to expire and no compliance measures were envisaged at the pre-judgment stage. From this perspective, Belgian approach to compliance is comparable to comprehensive

³⁴¹ Advocate General (2001), note 296, para.13.

³⁴² See Chapter '2.2. 'Anti-EdF' Law – the Spanish Version' of this study.

³⁴³ Case C-58/99 *Italy*, note 24, para.17, analysed in section '1.1. The First Golden Share Case on Privatisation Law of 1994' of this study.

compliance techniques applied in France and the UK – the MSs which complied following the judgments also envisaging considerable policy shifts on GSs issue prior to the judgments. However, since Belgium’s comprehensive compliance initiatives were implemented before the initial referral and subsequent judgment issued pursuant to the infringement procedure under Article 258 TFEU, its approach to compliance could be seen as the model for compliance in good faith with obligations stemming from the Treaty and judgments on GSs.

Similarly to French GSs and Spanish amendment to ‘anti-*E.ON*’ Law, the Belgian regime constituted non-discriminatory *ex post facto* measures. However, what is the most significant difference between the Belgian case and French and Spanish GS regimes is that Belgian *action spécifique* applied only to certain decisions and assets with tight time limitations for its application. Even though the Advocate General Colomer (paras.38-40) and other commentators (Cocciolo, Padrós 2010: 45-8) criticised the supposed *ex post* nature of the Belgian measures, when compared to French and Spanish regimes in energy companies, the substantive scope of Belgian measures appears more defined, as it applies to strategic assets and pipelines and not to the capital of the companies. What is pertinent to emphasise is, when comparing the Belgian GSs with other such measures it must be stressed that Belgian special rights were justified due to the *Distrigaz* and *SNTC*’s exclusive status as sole gas distributors within the national borders, the position different to any other MSs’ companies analysed in this study. Both *Distrigaz* and *SNTC* provided only a network utility service with the sole aim of storage and distribution of gas on the national territory, with no production involved whatsoever. So it is imperative to distinguish between the companies that provide services of general interest and companies whose sole responsibility is to distribute energy. Neither Italian *ENEL* or *ENI*, nor Spanish *Repsol* and *Endesa* or French *Elf* could have matched *Distrigaz* or *SNTC* due to the latter companies’ sole specification in gas distribution. The Belgian GSs could have been used as a framework for new GSs, however circumstances of the Belgian case were exceptionally unique so it is unlikely that similar GSs could be justified due to the following reasons.

Firstly, any such potential GSs would not only have to be legally certain and justified on imperative necessity for protection of public security, but also to apply it in companies which sole activity is provision of public service via network system, such as *Distrigaz* and *SNTC*. Secondly, even though in theory any new GSs could

meet the above criteria, such measures might not pass the proportionality test if they were implemented after the deadline for transposition of the Energy Directive. Nevertheless, the Belgian pre-referral amendments as well as pre-judgment compliance initiatives should be taken as an example of compliance with GS judgments in good faith. For the reason that the early stage of the enforcement action under Article 258 TFEU has been effective in facilitating comprehensive compliance in this case, the Belgian case is the only instance which demonstrates that compliance ‘by amendment’ could be of a comprehensive manner. In the Belgian case the core effectiveness/obstructionist hypothesis (H1) and the supporting hypothesis on effectiveness of minimalist compliance (H1a) are falsified. The second enforcement effectiveness hypothesis (H2) is not applicable and the hypothesis on effectiveness of the agenda-setting case-law (H3) is falsified.

6. The Netherlands: Comprehensive Compliance

This sub-chapter analyses compliance with the judgment on *Commission v Netherlands* GS in joined cases C-282/04 and C-283/04 (see Looijestijn-Clearie 2007). This GS judgment is significant for the development of the GS jurisprudence in several aspects, some of which will be shortly discussed in one of the following sections. The following analysis will reveal the initial resistance of the Dutch government to comply and relinquish GSs, followed by a significant policy shift into comprehensive form of compliance. This sub-chapter begins with a brief introduction on Dutch privatisation and the government's role in regulation of strategic industries, revealing why only limited number of GSs has been introduced. Section 6.B continues with the analysis of GSs in formerly state-owned telecommunications giant *KPN NV* and postal monopoly *TPG NV*, followed by analysis of the infringement procedure. Section 6.C concludes with analysis of the government's compliance initiatives revealing whether the Netherlands have acted in good faith.

6.A: Introduction on Jurisdiction

The Netherlands is a MS with one of the proportionally-largest public sectors within the EU, but there were very few publicly-owned companies and there was no fundamental difference between private and public companies as such (Edwards 1999: 23; Anderweg 1989: 117). Similarly to the UK, the Dutch economy has been open to national and foreign competition and since public enterprises operated mainly in domestic markets their share in national economy has been relatively small (Anderweg 1989: 118; Haffner, Berden 1998). The majority of public enterprises had a form of limited liability companies (*Naamloze Vennootschap*), thus the company's board of directors had the primacy over the state when it came to establishing the company's policies (Haffner, Berden 1998: 11). Since many of these companies were not natural monopolies, they have already been exposed to national and international competition as well as to foreign capital inflow.³⁴⁴ Thus, efficiency and competitiveness of the majority of Dutch public companies has been high with no need for further improvement through privatisation (Haffner, Berden 1998: 11; Anderweg 1989; Grundmann, Möslin 2003; Vries, Yesilkagit 1999;.

³⁴⁴ Today, as many as 70% of the shareholders of Dutch listed companies are foreign shareholders. See BEKKUM *et al* (2010), p.13; BERMANN *et al* (2002), p.2241.

Even so, the government sought to privatise in order to limit expansion of public sector, yet due to the specific nature of the latter and minimal state participation in ownership of the companies there was little to privatise in first place (Haffner, Berden 1998: 4-5). Dutch privatisation was generally similar to the Belgian one: it has been modest both in terms of width and depth, as there have been no ideological ambitions. On one hand, since the government has been reluctant to participate in ownership of public companies, the state involvement has been minimal. On the other hand, the government's ownership in companies which had a bigger impact on general public interests (such as public transportation, energy and water supply, post and telecommunications) has been considerable, yet in comparison to other MSs this ownership has never been substantial (Haffner, Berden 1998:10, 28).

For the purpose of this overall introduction it is pertinent to note that share ownership of Dutch listed companies is highly dispersed (Bekkum *et al* 2010: 13). In contrast to the British neo-liberal model of capitalism the Netherlands employ a stakeholder-oriented model allowing employees and trade unions to play a prominent role in corporate affairs.³⁴⁵ Additionally, a wide-ranging set of CEMs., with their effect similar to GSs mechanism, such as preference and priority shares – granting the holder special rights – are prevalent in the Netherlands.³⁴⁶ Some of these wide-ranging CEMs not only used to defend companies against hostile takeovers, but also substantially reduce shareholders' involvement in corporate affairs under normal circumstances. Similarly to Belgium, the Netherlands have also implemented the EU Takeover Directive in a protectionist way that discourages hostile takeovers (e.g. Roosenboom, Goot 2003; Bekkum *et al* 2010: 21-4). This defensive takeover tactic, coupled with effective CEMs and specific structure of Dutch public sector, have created significant protection for national companies. The large degree of protection, alongside with high competitiveness of national companies allowed the Dutch government to withhold from extensive application of GSs which provided only additional safeguards to the existing defensive measures against potential hostile takeovers.

³⁴⁵ According to the Dutch Corporate Governance Code: '[t]he greater the interest which the shareholder has in a company, the greater is his responsibility to the company, the minority shareholders and other stakeholders', see BEKKUM *et al* (2010), p.4&15, 18.

³⁴⁶ Report on the Proportionality Principle in the European Union (2007), p.10; LOOIJESTIJN-CLEARIE (2007), pp.440-42; BEKKUM *et al* (2010), p.1.

6.B: Golden Shares and the Infringement Procedure

Overall, there have been only four state-owned companies in the Netherlands, one of them being the *Dutch Postal & Telecommunications Service* – the main incumbent in the relevant markets.³⁴⁷ The government sought to introduce competition in relevant sectors by privatising *Dutch Postal & Telecommunications Service* in 1989 and renaming it *PTT* in which the state remained the sole shareholder. The government gradually disposed of its stake in *PTT*, at the same time making sure that following the entry of foreign competition the company does not fall into undesirable hands and the universal provision of public services in post and telecom is duly safeguarded (European Commission IP/03/1753). For this purpose the state amended *PTT*'s corporate statutes creating a non-discriminatory GS.

In 1998 the company was divided into two separate companies: *KPN* and *TPG*, so the government amended its initial GSs held in *PTT* to cover two new companies accordingly.³⁴⁸ At the time of the division the government has retained minority stakes, yet following GS's implementation the government has been gradually disposing of shares in both companies. In 2000 GSs held in *KPN* and *TPG* came in the midst of discussion on protectionist measures created across the EU, as *KPN*'s measures became one of the reasons for the Spanish government to employ its GSs held in *Telefónica*.³⁴⁹

The special rights reserved for the government in *KPN* were tantamount to the ones in *TPG*, establishing the system of *ex ante* approvals for a wide range of day-to-day and strategic managerial decisions, such as: certain investments and payments of share dividends, amendments to various provisions of company's statutes and resolutions of company's board on corporate restructurings.³⁵⁰ The GSs also granted the government with the right to appoint representatives with a decisive voting right onto the companies' supervisory boards.³⁵¹

Similarly as in the UK, the Dutch GSs have been incorporated into companies' statutes upon agreement between all shareholders, so the government envisaged that there was no need for any further justifications for these measures. In contrast to the

³⁴⁷ European Commission, SWD (2005), *supra* note 25, p.24.

³⁴⁸ Joined cases C-282/04 and C-283/04 *Netherlands*, note 52, para.7

³⁴⁹ See Chapter '2.1. Law No.5/1995: First Spanish Golden Share Case C-463/00' of this study.

³⁵⁰ Advocate General (2006) Opinion of the AG Poliares Maduro in Joined cases C-282/04 and C-283/04 *Commission v Netherlands*, para.5.

³⁵¹ European Commission (IP/03/180).

UK measures, however, Dutch GSs were transferrable.³⁵² Following the amendment of *KPN*'s and *TPG*'s corporate statutes, the Dutch government and companies concerned entered into an agreement according to which the government undertook not to use GSs in *KPN* and *TPG* to block any hostile takeovers, but to use its special rights only if the public interest in telecom and postal sectors would so require or in order to protect its interests as a shareholder in those companies.³⁵³

In spite of the foresaid agreement, the EU Commission sought to eliminate special rights reserved for the Dutch state, yet the government indicated that it has no intention of relinquishing its GSs (Putek 2004: 2278). The Commission issued formal letters to which the Dutch government replied by stating that special rights reserved for the government do not violate the Treaty freedoms and even if they do, they are justified on the grounds of necessity to ensure universal delivery of relevant services to the public.³⁵⁴ The Commission remained silent for more than two and a half years, without pursuing the matter any further. During this period the Dutch government continued to gradually dispose of its ownership in both companies.³⁵⁵ The condemning judgment on the similar UK GSs held in *BAA* could have prompted the Commission to pursue the matter on the Dutch case, so on 5 February 2003 it has issued a reasoned opinion. The government replied with a delay restating its claims.

On 13 May 2003 the CJEU has handed down its condemning judgment on the UK's GSs. Due to similarity of Dutch and UK provisions, the judgment presented certain implications for the justifications of the Dutch measures, since in comparison with the *BAA*'s GSs, the special rights in *KPN* and *TPG* appeared more wide-ranging and restrictive. Yet the major difference between the UK and the Dutch cases is that the government remained a minority shareholder in the latter case. In spite of the condemning judgment on UK measures the Dutch government resisted compliance, prompting the Commission to start judicial proceedings. At the time of referral to the CJEU the special right to appoint government representatives to the companies' supervisory boards has been removed from both companies' statutes, so the Commission did not maintain its claim on this point.³⁵⁶

³⁵² *Netherlands*, note 52, para.8.

³⁵³ *Ibid*, para.10.

³⁵⁴ *Ibid*, para.17.

³⁵⁵ *Ibid*, para.17; also HAFFNER, BERDEN (1998), paras.36-38.

³⁵⁶ Advocate General (2006), *supra* note 350350, paras.11&15.

During the judicial proceedings the Commission claimed that the system of prior approval in both Dutch companies is unjustified and disproportionate, thus contrary to the Treaty freedoms on capital movement and establishment.³⁵⁷ In its defence the Dutch government argued that the Treaty is not applicable in this case, since the GSs are not a state measure and the state is acting in its capacity as a private shareholder and not as public authority.³⁵⁸ In his opinion on the Dutch case, the Advocate General Maduro supported previous findings of the CJEU expressed in the ruling on the UK GSs case. The European advocate concluded that the obligation to obey to the fundamental freedoms stems from the state's 'organic capacity' as a signatory to the Treaty and 'it is immaterial how [special] powers are granted or what legal form they take'.³⁵⁹ The European advocate also rightfully stressed that if the government chooses to open certain sectors to competition via privatisation it has to 'act in a manner which is consistent with that decision' and protect the autonomy of the privatised company, unless there is a need to safeguard fundamental public interests.³⁶⁰ The Court had no difficulty in determining that the Dutch GSs at issue are in fact a state measure.³⁶¹

In case of special powers held in *KPN* the Dutch government did not put forward any justifications on the basis of general public interest, whereas in case of *TPG* it has claimed the general interest of safeguarding the universal postal service.³⁶² After analysing possible justifications and proportionality of the special rights, the Court ruled that the measures in *KPN* are not justified by any overriding reasons of general public interest, while the measures in *TPG* are disproportionate, overly restrictive, go beyond to what is necessary to attain the objectives pursued and, above all, both regimes are not subject to effective judicial review.³⁶³ Notably the CJEU commented on the 'one share-one vote' principle, establishing that the special rights reserved for the Dutch state allowed it to influence the management of the companies to the significantly greater extent than the size of its investment would normally allow.³⁶⁴ According to the Court, such enhanced influence

³⁵⁷ *Netherlands*, note 52, para.15.

³⁵⁸ *Ibid*, para.16.

³⁵⁹ Advocate General (2006), *supra* note 350, paras.22-24; Case C-98/01 *United Kingdom*, note 52, para.48.

³⁶⁰ Advocate General (2006), *supra* note 350, paras.28-30.

³⁶¹ *Netherlands*, note 52, para.22.

³⁶² *Ibid*, paras.35&37.

³⁶³ *Ibid*, paras.39-40.

³⁶⁴ *Ibid*, para.24.

undermines the rights of other shareholders and enhances the risk that such special rights would be used ‘in order to pursue interests which do not coincide with the economic interests of the company concerned might discourage direct or portfolio investments in that company’.³⁶⁵ The Court issued a condemning judgment on 28 September 2006, obliging the government to comply as soon as possible.

6.C: Analysis of Compliance

From the onset it should be noted that the Dutch government duly cooperated with the Commission on the GS cases by replying to the correspondence and revealing its inclination to withdraw the state participation from the companies concerned. At the time when the judicial proceedings have been in their advanced stage, the government further reduced its stakes in the said companies.³⁶⁶ This tendency of the government to withdraw its participation has been already evident at the pre-judicial stage of the infringement procedure (formal letters). On 16 December 2005 – one day prior to the Commission’s official announcement to refer the matter to the CJEU – the government’s GS has been transferred to *KPN* (Looijestijn-Clearie 2007: 439). From this moment, the state was no longer a beneficiary of the special rights as the GS in *KPN* with all the rights attached to it now became owned by the company itself. This transfer of the GS to *KPN* eliminated the infringement of the Treaty in this case as such. Interestingly enough, the determination of the Commission to include the matter of *KPN*’s GSs in its application to the Court goes in contrast to the similar situation established in the Belgian case.³⁶⁷ In the latter case, the breach has also been remedied after the date stipulated in the reasoned opinion, yet the Commission withheld its complaint on the matter and did not include the amended provisions in its application.

In this light, the Dutch pre-referral compliance measure on *KPN*’s GS sought to address the initiated infringement procedure, yet this compliance initiative did not preclude the Commission from referring the matter further. Since the GS in *KPN* could also be perceived to be similar to arrangements in *BAA*’s statutes, the Commission’s pursuit to bring the matter to the Court could be understood from this perspective.³⁶⁸ In the UK case, the Commission did not withdraw its compliance pressures until *BAA*’s statutes were amended and special GS provisions removed. In

³⁶⁵ *Netherlands*, note 52, para.26-30, para.30.

³⁶⁶ European Commission, SWD (2005), *supra* note 25, p.36.

³⁶⁷ See Chapter ‘5.D: Analysis’ of this study on Case C-503/99 *Belgium*, note 53.

³⁶⁸ As discussed in Chapter ‘3. The UK: the Leader in Golden Share Implementation’ of this study.

April 2006, on the following AGM of *KPN*, the company's statutes were amended and the GS provisions removed. On 2 September 2006 – six days prior to the condemning judgment – the last state-owned shares were privatised (Looijestijn-Clearie 2007: 439). In contrast to the GS provisions in *BAA*'s corporate statutes, which have been removed after the condemning judgment, the Netherlands fully complied with the Treaty prior to the judgment. This tactics constitutes the compliance in line with the good faith principle.

The Dutch government applied similar compliance strategy in relation to the GS held in *TPG* by gradually reducing its stake in the company. The government transferred its GS to the *TPG* on 16 November 2006, fully disposing of the residual ownership (ibid). The government has fully complied merely two months following the condemning judgment, transferring both GSs in the companies concerned. On the next AGM held on 20 April 2007 corporate statutes of *TPG*'s were amended and the GS provisions removed (ibid).

In spite of the Dutch government's resistance to relinquish its special rights at the earlier stages of the infringement proceedings, the pre-referral and pre-judgment compliance initiatives inevitably point to the MS's genuine inclination to comply as soon as possible and in good faith. Such pre- and post-judgment compliance conduct implies that the core enforcement effectiveness/obstructionist hypothesis of this study (H1) is falsified. The comprehensive compliance has been achieved due to the fact that the ruling resonated well with the on-going national policies on state withdrawal from public sector companies. The Dutch privatisation has been a gradual and methodical process, which allowed the government to ensure that its interests are duly protected. From the year of their implementation back in 1998, the GSs have been effectively serving their purpose and were duly relinquished when no longer necessary. It should be emphasised that at the time of the judgment on Dutch GSs, the CJEU has already ruled on six other such judgments, so the EU institutions have already confirmed and developed their policy regarding these measures. As a result, the compliance with cases C-282/04 and C-283/04 could be seen as confirming the Dutch government's wider shift to significant policy change in relation to GSs. The Dutch government had exceeded the compliance requirements by not only transferring the GSs in the said companies, but also by completely removing residual state ownership and proceeding with the full privatisations.

Hence the core enforcement effectiveness hypothesis of this study (H1) is not confirmed, (H1a) and H2 are not applicable, while (H3) is falsified.

7. Germany: Obstructionist Protectionism and *VW Law*

This chapter analyses compliance with the judgment on case C-112/05 *Commission v Germany*³⁶⁹ which is one of the most famous and longest-running cases in EU history. The case concerns the law defining corporate statutes of *Volkswagen AG*, the so-called *VW Law*.³⁷⁰ This landmark case differs considerably from other cases on non-discriminatory GS provisions created for the sole benefit of the state, such as GSs of the UK and the Netherlands (*e.g.* Sanders 2008). Similarly as in the foresaid cases GSs in *Volkswagen* were incorporated into company's statutes through the general provisions of national law, yet they were not exclusively reserved for the national authorities' benefit and applied without discrimination to all market participants, making its provisions a less obvious instance of GS.

Being one of the oldest instances of GSs the initial aims of the *VW Law* and its structure were unlike any other such provisions, which resulted in complexity of its post-judgment amendments. This case reveals a complex question of the Commission's pursuit for striking down national protectionist measures, which saw it verging too far into the ambit of national company and public law, allowing for radical liberalisation which goes against social models of some MSs and bringing additional legal restrictions on national systems (Höpner, Schäfer 2007). In this respect the *VW Law*, which gives an exclusive position to *Volkswagen's* workforce, also went to the heart of the debate on increasing reform pressures exerted on Germany's unique system of corporate relations and co-determination (*e.g.* Baums 2001; Komo, Villers 2009).

Most importantly, following the *Volkswagen* judgment the CJEU's case-law has been criticised for its ambiguity as the ruling represented an interpretational challenge for both the Commission and the German government. As a result, following the German compliance initiative, in the Commission's view, Germany resisted to comply fully. This led to a situation when *Volkswagen* case became the only known instance of the MS's shift to 'determined non-compliance' even under penalty threats.

This sub-chapter reveals motives for non-compliance based on substantial conflict between the defendant's and the Commission's interpretation of the

³⁶⁹ *Volkswagen* case, note 46.

³⁷⁰ Law governing the transfer of share rights of Volkswagenwerk GmbH to private parties of 21/07/1960 (*BGBI. I* 1960 and *BGBI. III*) as amended on 6/09/1965 (*BGBI. I* of 31/07/1970).

compliance obligations. To address the rationale behind obstructionist behaviour this sub-chapter encompasses an introduction on the German model of managed capitalism and its long-standing tradition of unique industrial relations. This overview analyses evolution of the relationships between the German companies, Federal state (the *Bund*), the States (*Länder*) and stakeholders, which evolved as a result of a corporate shift from tradition of social responsibility towards a shareholder-oriented philosophy – the shift which concerned all German companies with the sole exception of *Volkswagen*. This introduction sets the scene for the subsequent evaluation of the *VW Law* as a unique measure aimed at safeguarding social objectives inherent in principle of social responsibility. It also contributes towards evaluation of Germany's reluctance to remove GSs both pre- and post-judgment.

Building on introduction, Section 7.A analyses background of the *VW Law*, while Section 7.B reveals the main differences between the law and *Aktiengesetz* (*AktG*)³⁷¹ – the German stock company law. This section will also assess the extent to which the shift to free-market values has contributed towards the inherent obstructionist nature of the *VW Law*. Section 7.C provides insight into the *Volkswagen/Porsche* takeover battle, coupled with the infringement procedure and followed by the analysis of the government's inclination to comply pre-judgment. Section 7.D analyses the potential for compliance and Section 7.E analyses the post-judgment compliance. Here the emphasis is laid on Germany's incline to resist compliance due to the interpretational challenges presented by the CJEU's judgment. The summative analysis of the compliance situation is provided in conclusion.

Introduction

Historically, Germany operated under typical system of 'managed' or 'organised' private capitalism. Its main characteristics are: political regulation which promoted tight business inter-connections, close business-banking partnerships, interlocking directorates, high ownership concentration, cross-shareholdings and coordinated industrial relations between numerous stakeholders such as employees, managers, customers, suppliers, cooperating companies and banks (Rhodes,

³⁷¹ *Aktiengesetz* of 6/09/1965 (*BGBI.*, p.1089), hereafter cited as *AktG*, as amended by the Act of 27/04/1998 (*BGBI.* 1998I), hereafter cited as *KonTraG*, amended by *Restrukturierungsgesetz* of 9/12/2010, (*BGBI.* I p.1900); for German-English translation of the 1965 version see SCHNEIDER, HEIDENHAIN (2000).

Apeldoorn 1998; Schmidt 2002; Beyer, Hoppner 2003). Another characteristic feature is the labour co-determination via the two-tier corporate governance structure in large companies, which assigns the creation of supervisory and management boards. The German dual board system ensures that the labour interests are duly accounted for by the management of the company. This dense network of closely-knit relationships promoted consensus and long-termism among stakeholders who worked together to achieve common goals, at the same time investor protection has been weak and shareholder influence limited (Rhodes, Apeldoorn 1998; Beyer, Hoppner 2003; Franks *et al* 2005).

Coordinated industrial relations between social partners assumed the embedded principle of social responsibility which was ‘deeply rooted in German society’ (Beyer, Hoppner 2003; 181) and played an important role in business (Franks *et al* 2005: 6). The social responsibility principle implied that the company and its management have broad social obligations. As opposed to the UK shareholder-orientated model, German companies prioritised by putting social interests front and centre, such as stable employment for labour, as well as serving the wider interests of the state (*ibid*). Shareholders were seen merely as ‘savers’ and not investors, their interests were not a priority (Berger 1970: 741). Employees’ interests were supported through board-level co-determination, centralised trade unions and strong workers councils. The first *AktG* of 1937³⁷² strengthened management influence over the companies and managers’ control has gone far beyond sole interests of their own companies, but outstretched to consider wider interests of regional and national economy (Berger 1970: 690; Rainer 1968: 71; Beyer, Hoppner 2003: 183).

The *Bund* has played an important role in regulation of industries and even though the state’s ownership was relatively small (Esser 1989: 60-2, 68; Schmidt 2002: 177), the state assumed considerable impact on some key industries since it has retained large stakes in biggest companies. From the onset, the industrial ownership and control of the *Bund* should be distinguished from the ones of the *Länder*. Due to the constitutional limitations, the Federal government has little intervened in the economic decision-making and industrial policy. The *Bund* merely ‘enabled’ effective activity of the *Länder* by means of supportive legislation and financial aid (Schmidt 2002: 166-7, 180). The regional governments on the other

³⁷² Of 30/01/1937 (*RGBl.* I 107); see FRANKS, *et al* (2005), p.6.

hand, had a significant participation in ownership and control of strategic companies (Vickers, Wright 1989: 10; Schmidt 2002: 167), actively nurturing them by creating supportive economic environment for development and success (Schmidt 2002: 167). Moreover, the regional governments of the *Länder* in which large companies dominated, were most likely to resort to divergence and experience more freedom in their relationships with such companies. One good example of such business-government relationship could be observed in the case of car-manufacturing giant *Volkswagen* and the Land of Lower Saxony where the company has been historically established (ibid, 308).

The German business/social system faced little economic vulnerability, effectively ensuring high competitiveness for companies on European and international markets, as well as high wages and secure employment for the workforce. At that time the largest German companies operating in network industries co-ordinated their actions instead of competing for the market, this ensured their special position as the most successful companies of that art within the EU (Hermann, Verhoest 2012: 13). The matters have changed considerably in 1990's in a view of emerging international competitive challenges and the EU pressures to de-regulate and liberalise national industries. The *Bund* adapted to changes by introducing market capitalist elements into its system via reforms and widespread privatisation of 1990s', yet previously there were several other privatisation attempts (Schmidt 2002: 172).

In 1959 Germany became the real pioneer in promotion of stock ownership culture through privatisation (Bortolotti, Milella 2006: 15; Berger 1970: 690). At that time, the Federal government encouraged small investors, such as companies' employees and ordinary citizens, 'to participate in Federal wealth' (Esser 1989: 63) by purchasing so-called 'people's stock'. In 1960 the *Bund* has partially privatised few profitable companies such as *Volkswagen* with both the *Bund* and the *Land* retaining 20% minority stakes each – to guarantee continuous state influence. During the second wave of 1980's privatisations the *Bund* fully disposed its stake in *Volkswagen*, while the Land of Lower Saxony refrained from selling its stake, becoming the largest shareholder.

The attitude to social responsibility concept shifted in 1990's when German companies became increasingly concerned about international competitiveness, striving to increase productivity and lower production costs by decreasing the

numbers of employees and moving businesses abroad. In 1998 the *Bund* has brought the long tradition of social responsibility obligation to an end by amending the *AktG*.³⁷³ From that time on, the German tradition of tight industrial relations has eroded considerably, triggering disintegration of managed capitalism, undermining traditional relationships between stakeholders and reducing the influence of the state (Beyer, Hoppner 2003: 184;).

Originally, the *AktG* allowed for the creation of powerful CEMs such as multiple-vote shares and ownership ceilings, which aimed at shielding national companies from foreign takeovers (Berger 1970: 724; Henle 1994: 123). The §134(1) *AktG* of 1998 introduced the shareholder value philosophy by declaring the ‘one share-one vote’ principle for the *listed* companies and stating that there must be a correlation between the amount of shares held and the voting rights attached to them. In an accompanying document the government expressly confirmed that one of the most effective CEMs – the voting right ceilings – is undesirable for listed companies.³⁷⁴ According to the §134(1) *AktG* of 1998 in cases where a shareholder holds a larger number of shares in a *non-listed* company, the company’s statutes could contain provisions on capping voting rights by setting a voting right ceiling. The *AktG* of 1998 did not fully apply to one particular *listed* company – *Volkswagen*, making the *VW Law* and its voting right ceiling the sole derogation from general company. The exclusive 20% voting right ceiling of the *VW Law* indirectly benefited the minority shareholder – the Land of Lower Saxony.

For the purpose of this introduction it should be noted that even though German company law makes a ‘one share-one vote’ a mandatory principle for the *listed* companies it also allows for implementation of other CEMs, yet they are not generally implemented by German companies.³⁷⁵ Apart from the *VW Law*, GSs are uncommon in Germany.

7.A: The Background of the VW Law

The system of managed capitalism and its embedded concept of social responsibility served the wider interests of the state, guaranteed secure employment and high wages for the labour, yet the long-standing tradition of co-ordinated

³⁷³ *AktG* amended by the Corporate Sector Supervision and Transparency Act of 27/04/1998 (‘KonTraG’), (BGBl. 1998 I, p.786).

³⁷⁴ Explanatory memorandum to *KonTraG* in *Deutscher Bundestag* (28/01/98), Drucksache 13/9712, p.20; on voting right ceilings as a means against hostile takeovers see HELNE (1994).

³⁷⁵ Report on the Proportionality Principle in the European Union (2007), p.10&49.

industrial relations adopted a free market values and shareholder orientation, diminishing the importance of social responsibility obligation and increasing shareholder influence. With one exception: at times when other companies were free to implement decisions which would seem contrary to social responsibility principle, *Volkswagen* remained subject to the *VW Law*, which effectively diminished shareholder value while increasing stakeholder value. In order to gain a better understanding of the *VW Law* and subsequent compliance it is necessary to consider the historic prerequisite. This background of the GSs' origin has made up a principal part in Germany's defence during the infringement proceedings, so it is essential for the understanding of the relationships between the initial spirit of this GS law and Germany's resistance to its removal.

Volkswagen stands out as a symbol of German economic miracle³⁷⁶ as it is one of the most prominent examples of successful operation of managed capitalism and social-oriented industrial relations. Being one of the largest car manufacturers in the world, *Volkswagen* is known for its extensive, powerful lobby and it has long been associated with strong labour influence and employee participation in building the company's wealth and boosting its economic development. Therefore, it is understandable why many saw the infringement procedure brought against the GSs of *VW Law* as a direct attack on 'a symbol of the German way of life',³⁷⁷ as well as an attack on the long-standing traditions of German industrial relations and inherent social responsibility values (Saam, Zumbansen 2007). The company has grim national socialist origins that go back to 1933 and its past has been tightly associated with the objective of building the 'People's Car' (ibid; Lupa 2003: 35). The project required large capital injections and for this purpose the German trade union organisation has introduced a savings plan. The plan encouraged company's employees, wishing to obtain an automobile, to deposit funds which were intended to cover the costs of production. Therefore, initially *Volkswagen* is a state-owned company partially funded by employees and public investments. The company's factory and a new city called Wolfsburg were built in Lower Saxony. The grandiose plans for building an affordable car were abandoned because of the Second World War and the savings plan collapsed. Following the war, Lower Saxony assumed

³⁷⁶ Advocate General (2007a) Opinion of the AG Colomer of 13/02/2007 on Case C-112/05 *Commission v Germany*, para.1.

³⁷⁷ Advocate General (2007a), *op. cit.*, para.2.

administration of the company on behalf of, and under the supervision of, the *Bund* (Lupa 2003: 35).

Over the coming decade *Volkswagen* became an exceptionally successful company and the largest employer in Lower Saxony. Its stable workforce perceived itself an integral part of the company while also receiving high wages, and considerable social benefits. . At that time, despite its success, *Volkswagen* remained without an owner, so when the *Bund* raised the question of privatisation it brought up a considerable conflict of interests between the stakeholders such as savers, trade unions, employees, the *Land* and the *Bund*. Employees fought for their privileged position, assuring themselves a direct participation in the success of the company. The unfortunate savers claimed their private rights over the company. The trade unions also claimed their share. As a result, each of the above five parties claimed the ownership of *Volkswagen* and the dispute stretched for many years.³⁷⁸

The solution to privatisation stalemate emerged in the view of an ownership compromise: the national and regional governments agreed that shares of the company should be widely distributed, while the interests of the workers and trade unions must be protected against any large shareholder which could gain control over the company. Employees and the unions agreed to relinquish their ownership claims for *Volkswagen* in return for the authorities' guarantee that their interests would be duly protected.³⁷⁹ The *Land* and the *Bund* agreed to widely distribute the company's shares, making it difficult for any party to accumulate a large shareholding. In 1959 the two administrations concluded a private contract (*Staatsvertrag*) according to which 60% of shares had to be privatised, while the remaining 40% would be equally divided between the *Land* and the *Bund*.³⁸⁰ All interested parties: shareholders, the *Land*, the *Bund*, employees and other stakeholders agreed that the provisions of the contract have to be incorporated into company's statutes. Subsequently, on the basis of this *Staatsvertrag* the German parliament (*Bundestag*) approved the *VW Law* on 21 July 1960.

To summarise on the subject of origins of the German GSs law, it should be emphasised that the initial aim of the provision was to solve the stalemate situation regarding the *Volkswagen*'s ownership by reaching an agreement between the administrative bodies and stakeholders. The text of the *Staatsvertrag*, which sought

³⁷⁸ Advocate General (2007a), *supra* note 376, para.26.

³⁷⁹ *Volkswagen* case, note 46, para.22.

³⁸⁰ *Ibid*, para.23.

to ensure the authorities' influence and control over *Volkswagen*, has been cemented by way of further legislative activities of the *Bundestag*. Since all the parties accepted and agreed on the further legalisation of the measures by the *Bundestag*, the *VW Law* could be considered as facilitating interests of all of the parties involved: the *Land*, the *Bund* and company's employees. The savers, employees and trade unions relied upon the continuous administrative protection over their inherent interests and over the company as a whole, so declaring these guarantees via specific legislation seemed as the right way forward.

7.B: Analysis of the VW Law

Initially the *VW Law* established a voting right ceiling limiting shareholders' rights at 0.01% while both the *Land* and the *Bund* could exercise their rights in proportion to their shareholdings.³⁸¹ Later this provision has been amended and the 20% voting right ceiling applied to all shareholders. Apart from the provision of §2(1) establishing a voting right ceiling that limited the voting rights of any investor to 20%, the *VW Law* contained the following provisions: §3(5) restricted the right of representation for the exercise of voting rights at the AGM to a maximum of 20% for any single shareholder; §4(1) governed the right of directors appointments, allowing the *Bund* and Lower Saxony to appoint two members to the supervisory board each, for as long as these administrative bodies remain shareholders; §4(2) provided that construction and relocation of factories must be approved by a majority of two thirds of the supervisory board. The latter paragraph was not subject to the subsequent infringement proceedings. Finally, §4(3) provided that in order to be approved, resolutions of the AGM shall require a favourable vote of more than four-fifths or 80% of the share capital, whereas the *AktG* provides for a majority being at least three quarters or 75%.

The *VW Law* applied to all shareholders, yet it deviated from general provisions of the *AktG* in two aspects. Firstly it has introduced a voting rights ceiling which was prohibited for *listed* companies, secondly it has provided for an increased majority and lastly it granted the authorities with special right to appoint four directors. The voting right ceiling of §2(1) and the increased majority provisions of §4(3) *VW Law* differ considerably from other such arrangements in other MSs in one respect: they did not reserve the special right for the benefit of the authorities *per se*

³⁸¹ *Volkswagen*, note 46, para.32.

but rather used the provisions of national company law to treat the authorities as a an ordinary private shareholders via corporate statutes. The *VW Law* granted the authorities only with the special right to adopt directors, yet no other provisions as such referred to the *Bund* or the *Land*. The initial share ownership of the authorities was exactly matching the provisions of the *VW Law*, effectively putting the state-shareholders in advantageous position. In the strictest sense, any other shareholder owning 20% of *Volkswagen's* shares could benefit from the foresaid provisions. However, the provisions were implemented by the *Bundestag* making them an anomaly in the general operation of the German company law. Above all, the *VW Law* differs from other GSs since it has been exclusively introduced for one single company, which does not provide services of general public interest.

The effectiveness of the *VW Law* has neither been undermined by disintegration of managed capitalism, nor by legislative reforms. Following the reform of the *AktG* in 1998, voting right ceilings have been outlawed for *listed* companies, but not for *Volkswagen*. On one hand, the fact that the said provision was exclusively exempt from reforms which points towards its inherent obstructionist character. On the other hand, it also signifies that the stakeholders and interested parties have been content of with the said provisions.

Here it is pertinent to emphasise that the exclusive 20% voting rights ceiling of §2(1) *VW Law* could be ineffective by itself (Henle 1994: 123) for thwarting a hostile takeover due to the following reason. According to §134(1) *AktG* any limitation on the voting rights would not be taken into account on strategic decisions, such as company's dissolution, for which the *capital majority* is required. Moreover, according to §179(2) *AktG* a shareholder who acquires 75% of the company's share capital may amend company's statutes by removing any voting right limitations. For this reason the voting right ceiling introduced by § 2(1) *VW Law* has been re-enforced by further provision of §4(3) *VW Law* which increased the threshold for required majority shareholding from 75% to 80%. This increased majority now matched the blocking minority stake held by the authorities. The combination of the two above paragraphs of the *VW Law* ensured effective control over the company, making it takeover-proof for as long as any of the authorities holds on to its 20% minority stake.

Provision §4(1) *VW Law* on director's appointments is closely reminiscent of the classic GS mechanism, since the authorities are directly put in advantageous

position to appoint two directors onto supervisory board each irrespective of their actual stake. Supervisory Board of *Volkswagen* comprises of 20 members, 50% of which are employee representatives and 50% are elected by shareholders. According to §101(2) *AktG* the right to appoint representatives on the supervisory board may only be granted by the company's statutes and may concern only *one third* of the number of members of the supervisory board appointed by the shareholders. According to this provision the *Bund* and the *Land* could appoint a total of three directors out of ten members of *Volkswagen*'s supervisory board. At the same time §101(2) *AktG* further provides that the *VW Law* shall be exempt from the above restriction on appointments, so both authorities could appoint two representatives each. Therefore the *VW Law* gives the authorities an exclusive possibility of a larger representation on the board than general company law would normally allow, giving the authorities more weight in the company's management. This would especially be the case if both the *Bund* and Lower Saxony would retain one share each – in this case the gained influence would not correlate with the actual share ownership. The *Bund* has sold its remaining block of shares and could no longer exercise its special right of appointment, yet the provision still applied to Lower Saxony. The two representatives of the *Land* together with ten representatives of the employees outweighed the remaining eight members appointed by other shareholders, effectively forming a majority. In spite of the fact that main function of the supervisory board is monitoring of the management board, it is a powerful body which can appoint and dismiss the members of management board and approve important decisions. As a result the appointment right complemented the protective powers of the voting rights ceiling and the blocking minority also complimenting §4(2) *VW Law* which provided that relocation of factories must be approved by a majority of two thirds of the supervisory board.

The interplay of the *VW Law* provisions effectively allowed employees and authorities to execute greater involvement in operation of the company, thus allowing for the greater pursuit of social objectives, such as protecting jobs. The *VW Law* reinforced the power of Lower Saxony to further promote stakeholder interests and adhere to managerial strategy which would correspond with the principle of social responsibility that was largely abandoned elsewhere. The government has confirmed that the main purpose of the *VW Law* was to 'take into account the interests of *Volkswagen*'s employees and to protect its minority shareholders', so it

‘pursues a socio-political and regional objective, on one hand, and an economic objective, on the other, which are combined with objectives of industrial policy’.³⁸² Consequently, *Volkswagen*’s approach to company law and its philosophy of corporate governance represented a stakeholder-oriented model characterized by the traditional German way of negotiated solutions aimed at safeguarding the interests not only of the shareholders, but of all affected stakeholders (Gerner-Beuerle 2012: 98).

Germany’s view of the *VW Law* as a means of employee protection was later contradicted by Advocate General Colomer in his opinion on the *Volkswagen* case, stating that the provisions at hand do not protect interests of the employees and only remotely and indirectly apply to them.³⁸³ Controversially, conclusion of the European advocate could not be supported by the employment practices at *Volkswagen*.³⁸⁴ While it is almost impossible to shut down any of *Volkswagen*’s factories or relocate those abroad, the security of employment is also very high (Financial Times 25/10/2007). Employees’ strong interests in preservation of the *VW Law* as well as Lower Saxony’s control as shareholder and its powerful lobby could also contribute to obstructionist nature of the measures – both the employees and the *Land* could go to great lengths to preserve their influential positions.

In mid-2000’s a German family-owned sports car manufacturer *Porsche* first appeared as a friendly bidder for *Volkswagen* (Financial Times 6/12/2005; Economist 14/06/2008). The *Porsche* deal could be attractive to *Volkswagen*’s shareholders, yet their voices could have been muted by the majority formed by the *Land* and the employees. It is important to note that in contrast to *Volkswagen*’s approach to corporate governance, *Porsche* adhered to the competition-centred shareholder-oriented model putting shareholder interests front and centre and rejecting the use of CEMs (Gerner-Beuerle 2012: 98).

The scale and volume of this takeover attempt is unique even by contemporary standards making it one of the most complex and problematic takeovers worldwide. The *VW Law* became a real hindrance for *Porsche* ambitions, so it sought to remove it with the help of the EU Commission, hoping that the government could be talked into compliance.

³⁸² See BERGER (1970), p.688; *Volkswagen* case, note 46, para.70.

³⁸³ Advocate General (2007a), *supra* note 376, para.100.

³⁸⁴ As practice shows, the *VW Law* allowed the *Volkswagen*’s workforce to retain the most privileged economic positions than anywhere within automobile industry: the employees were still being paid 20% more for working the shortest workweek and their social guarantees are the most advantageous.

7.C: The Infringement Procedure and Takeover Battle

From the onset it was clear that the German authorities had a firm stance on the *VW Law* as throughout the decades it has neither been undermined by disintegration of managed capitalism, nor by legislative reforms.

The Commission had been aware of the existence of the *VW Law* provisions long before the landmark GSs rulings of 2002.³⁸⁵ The EU Internal Market Commissioner Frits Bolkestein has long criticised the *VW Law*, stating that *Volkswagen* is taking over foreign companies, while itself staying out of reach, yet Bolkestein also referred to the *VW Law* as being only a ‘symbol’ which could be easily discarded by the German government (Euromoney, November 2004; Financial Times 28/01/2004). The lengthy process of informal compliance bargaining between the Commission and the *Bund* that started in 2001 proved to be unfruitful and *Porsche*’s takeover ambitions could have acted as a catalyst for more rigid intervention at the EU level. During the informal compliance bargaining stage politics came into play: there were concessions in a view of numerous delays initiated by the Commission, which could be attributed to the Commission’s strive to ensure Germany’s support for the EU Takeover Directive (European Commission IP/03/410). It took another year before the Commission finally launched official infringement proceedings, issuing a formal letter on 19 March 2003 and requesting Germany to submit justifications within two months (ibid). Setting the deadline for the MS’s reply at this stage has been an extraordinary circumstance, which arguably has been prompted by the urgency of *Porsche*’s takeover ambitions and by the evident unlawfulness and obstructionist nature of the *VW Law*. The government replied in a timely manner insisting on legality of the measures.³⁸⁶ Following this reply, the Commission prepared to issue a reasoned opinion, yet before the official move, the Commission’s President Romano Prodi decided to meet with Chancellor Schröder.³⁸⁷ The result of this meeting was negative and could have been predicted due to two circumstances. First of all, Schröder had been a member of *Volkswagen* supervisory board for eight years while serving as the premier of Lower Saxony and for this matter he has been dubbed as ‘automobile chancellor’ (Hopt 2010: 21). So

³⁸⁵ Case C-367/98 *Portugal*, note 29; case C-483/99 *France*, note 52 and case C-503/99 *Belgium*, note 52.

³⁸⁶ Advocate General (2007a), *supra* note 376376, para.30.

³⁸⁷ Citing spokesman for Internal Market Commissioner Frits Bolkestein in *Financial Times* (28/01/2004).

the ‘automobile chancellor’ was aware of the *VW Law*, its aims and provisions, as well as its importance for Lower Saxony. Secondly, Schröder was known for his strive to increase Germany’s freedom for pursuing its own national interests instead of normative commitments to Europe, thus protection of true tradition and symbol, such as the *VW Law*, would perfectly fit the bill (Schmidt 2012: 180). On 1 April 2004 the Commission issued a reasoned opinion (European Commission IP/04/400). Germany failed to comply.³⁸⁸

Following the Commission’s announcement to refer the action to CJEU (European Commission IP/04/1209), the government remained confident that the *VW Law* is compatible with the Treaty and the German Secretary for Justice Brigitte Zypries has assured that the *Bund* ‘will convince the Commission of this’ (Automotive News Europe 1/11/2004). In a similar fashion, Gerhard Schröder stated that he would fight the Commission’s attempts to overturn the *VW Law* (Euromoney November 2004). The referral came at difficult times for *Volkswagen*’s workforce since it got under increased pressure to reform by diminishing its labour spending: the company’s chief executive pressed for cutting jobs and extending working hours (Financial Times 3/03/2006). In this light defending the *VW Law* has become even more imperative for the government of the *Land*, since the current prime minister of the Lower Saxony was facing elections in a few years’ time (Financial Times 30/12/2005). The government’s determination to resist compliance pre-judgment contributes to the obstructionist nature of the measures in question.

Despite the government’s opposition to comply, when the case was brought to the CJEU on 4 March 2005, *Porsche* remained confident that the *VW Law* shall not withstand the Court’s enquiry and it has been widely accepted that the law will be overturned (ibid; Rammeloo 2007: 118). *Porsche* was gradually building up its stake in *Volkswagen* (Financial Times 26/09/2005, 27/09/2005) and its intentions became clear: gaining majority stake and once the judgment is handed and the *VW Law* removed – take control of *Volkswagen*.³⁸⁹ Even though German measures did significantly differ from the preceding GSs analysed it did not withstand the CJEU’s scrutiny and the following paragraphs will touch upon the most crucial points of the judgment revealing any inclination to shift towards compliance.

³⁸⁸ Advocate General (2007a), *supra* note 376, para.32.

³⁸⁹ European Commission Decision (23/07/2008) Case No. COMP/M.5250 - *Porsche/Volkswagen* (SG-Greffe (2008) D/204790).

In the due course of the judicial proceedings Germany emphasised the historical background of the *VW Law* claiming that the Treaty provisions do not apply since the provision at issue is not a state measure so far as it merely reproduced the private law contract between the *Bund* and Lower Saxony. The government insisted that the measure stems from normal operation of general company law and Lower Saxony is acting not as an authority but as a private shareholder.³⁹⁰ In Germany's view the *VW Law* was an expression of will of the parties which originally claimed ownership over *Volkswagen* at the time of the ownership stalemate, so the measures in question must be treated as an agreement between those parties. Yet, the Commission focused its criticism not on origins of the *VW Law* but on Germany's determination to maintain these provisions for more than four decades.³⁹¹ The Commission agreed that general company law allowed the company's statutes to increase the majority threshold required for implementation of strategic decisions and to implement voting right ceilings for unlisted companies, however it has emphasised that in case of listed company *Volkswagen* the 20% ceiling deviates from normal operation of company law and both measures are imposed by means of the *VW Law* and not solely by the will of company's shareholders.³⁹²

Germany's plea of inapplicability of the Treaty provisions to the *VW Law* has been addressed by Advocate General Colomer in his opinion where he has found it 'puzzling' that the private law contract between the *Bund* and the *Land* is referred to as a private agreement and that the government does not regards the *VW Law* (adopted by the *Bundestag*) as a state-imposed measure.³⁹³ The European advocate sided with the Commission in its view that the initial purpose of the *VW Law* is irrelevant, but rather the government's failure to amend or repeal existing GS provisions for so many years.³⁹⁴ The CJEU supported the Commission and the European advocate in their observations that the exclusive rights reserved for the authorities restricted the rights of other shareholders to effectively participate in control of the company, noting that the *VW Law* can no longer be amended or repealed by the sole will of the shareholders since any modification requires further

³⁹⁰ *Volkswagen* case, note 46, paras.22-24.

³⁹¹ *Ibid*, para.25.

³⁹² *Ibid*, paras.31&35.

³⁹³ Advocate General (2007a), *supra* note 376, para.45.

³⁹⁴ *Ibid*, para.74.

legislation by the *Bundestag*.³⁹⁵ The Court agreed with the Commission's view that that there is a significant 'difference between a *power* made available to shareholders, who are free to decide whether they wish to use [this CEM] or not, and a *specific obligation* imposed on shareholders by way of legislation without giving them the opportunity to deviate from it'.³⁹⁶ It should be added that the European advocate agreed that in case if increased majority and voting right ceiling of the *VW Law* would not exist, but rather were incorporated into company's statutes the validity of the provisions disputed in these proceedings would not be called in question.³⁹⁷ This signifies that the special GS paragraphs of *Volkswagen's* corporate statutes which benefit the *Land* are called into question only because they were later transposed into the *VW Law*.³⁹⁸

After establishing that the *VW Law* is a state measure, the CJEU turned to the analysis of its deterring effect. Even though the Commission asserted that all three provisions infringe the Treaty individually, both the European advocate and the Court proceeded to analyse the increased majority and the voting right ceiling provisions together in order to assess their combined deterring effect.³⁹⁹ The European advocate maintained that the consequences of the two provisions aimed 'to preserve the status quo' of the *Bund* and Lower Saxony, which has been further reinforced by the director's appointment right.⁴⁰⁰ In his analysis the European advocate concluded that '[t]he difficulties faced by investors who were not parties to the initial agreement are clear and will continue to exist, at least potentially, while the contested provisions remain in force' (Advocate General 2007a, para.90).

The Court followed the European advocate's lead in jointly assessing the voting right ceiling of §2(1) and increased majority of §4(3).⁴⁰¹ The CJEU established that increased majority of the *VW Law* to 80% instead of 75% (as provided by *AktG*), 'creates an instrument enabling the Federal and State authorities to procure for themselves a blocking minority, allowing them to oppose important resolutions on the basis of a lower level of investment than would be required under general company law.'⁴⁰² The Court went on to *link* the effects of the increased

³⁹⁵ *Volkswagen*, note 46, para.28.

³⁹⁶ *Ibid*, para.40 (emphasis added).

³⁹⁷ Advocate General (2007a), *supra* note 376376, para.91.

³⁹⁸ *Volkswagen*, note 46, paras.45-46.

³⁹⁹ Advocate General (2007a), *supra* note 376, paras.76-81.

⁴⁰⁰ *Ibid*, para.87.

⁴⁰¹ *Volkswagen*, note 46, para.30.

⁴⁰² *Ibid*, para.50.

majority provision and the voting right ceiling, stating that ‘[b]y capping voting rights at the same level of 20%, §2(1) of the *VW Law* supplements a legal framework which enables the Federal and State authorities to exercise considerable influence on the basis of such a reduced investment’.⁴⁰³ Following the joint analysis of the effects of voting right ceiling and increased majority of the *VW Law* the Court came to the conclusion that ‘*the combination of §2(1) and §4(3) of the VW Law constitutes a restriction on the movement of capital*’.⁴⁰⁴

When addressing possible justifications, Germany referred to a specific situation, the social, regional, economic and industrial policy objectives underpinning implementation of the *VW Law*, which established an ‘equitable balance of powers’ aimed at protecting minority shareholders and employees.⁴⁰⁵ The Court agreed that in certain special cases the *Land* and the *Bund* could defend general public interest which could be contrary to economic interest of *Volkswagen* and its shareholders.⁴⁰⁶ The Court also agreed that a company as large as *Volkswagen* could have such definite impact on the general interest which would justify GS measures of the *VW Law*.⁴⁰⁷ Yet, Germany failed to provide grounded arguments for the above justification and ‘failed to explain [...] why the provisions of the *VW Law* [...] are appropriate and necessary to preserve the jobs generated by *Volkswagen*’s activity’.⁴⁰⁸

Regarding the special right of directors’ appointments to supervisory board, the European advocate concluded that the *VW Law* ‘destroys’ ownership-control correlation and since the board’s approval is necessary for certain strategic decisions, the law limits rights of other shareholders for effective participation in company’s management and control.⁴⁰⁹ In response to German justifications the European advocate concluded that ‘it is completely misleading to cite the interests of the employees’ as justification for such measure and the government ‘confuses’ the general public interest with the interests of the *Land* and the *Bund*.⁴¹⁰ The European advocate emphasised that *Volkswagen* ‘must adapt’ to changes which have taken

⁴⁰³ *Volkswagen*, note 46, para.51.

⁴⁰⁴ *Ibid*, para.56, (emphasis added).

⁴⁰⁵ *Ibid*, para.70; Advocate General (2007a), *supra* note 376376, para.95.

⁴⁰⁶ *Volkswagen*, para.79.

⁴⁰⁷ *Ibid*, para.80.

⁴⁰⁸ *Ibid*.

⁴⁰⁹ Advocate General (2007a), *supra* note 376, paras.72-73.

⁴¹⁰ *Ibid*, paras.97&102.

place on the European scene.⁴¹¹ The CJEU acknowledged that the right to directors' appointments restricts other shareholders' rights for effective participation in management and control of the company and therefore 'is liable to deter direct investors from other MSs'.⁴¹² In the effect to all of the above, on 23 October 2007 the CJEU has issued its verdict: Germany failed to present viable arguments for justifying the *VW Law* so its provisions are unlawful. In spite of the assurances that the judgment has effectively nullified⁴¹³ the *VW Law* it has retained its dissuasive power. Nonetheless, the German government now had to repeal or amend it in order to comply with the judgment and clear the way for *Porsche's* control over *Volkswagen*.

7.D: Assessing Potential Compliance

Generally the condemning judgment would signify that it is time for *Volkswagen* to abandon its long-standing tradition of social responsibility assumed by the company's management. In principle, following the judgment, *Porsche*, being the largest shareholder, could have *de facto* assumed control, given its significant ownership of *Volkswagen's* shares. Porsche acquired options for the remaining shares boosting its ownership to 75% threshold so according to the break-through rule of the Takeover Directive it could amend *Volkswagen's* statutes and remove the controversial provisions of the *VW Law*. However, as the MSs' compliance pattern on other GS cases suggests, in practice the implementation of post-judgment compliance measures could be severely delayed and when implemented, they could prove to be ineffective and inadequate for facilitating full compliance. In case of *Volkswagen*, Germany's inclination to comply could be drawn from analysis of its pre-judgment behaviour as well as overall situation surrounding *Porsche's* takeover at the time of the judgment.

During the infringement procedure the government did not anticipate to succumb to the Commission's observations and did not amend or undertake to repeal the *VW Law*, as was the case in *Commission v Italy* C-58/99 for example. On the contrary, when it comes to good faith conduct during the pre-judgment stage of the infringement procedure, Germany could be seen as effectively cooperating with the Commission. It has timely replied to correspondence striving to settle the matter

⁴¹¹ Advocate General (2007a), *supra* note 376, para.97.

⁴¹² *Volkswagen*, note 46, paras.60-66.

⁴¹³ OECD (2007), *supra* note 307, p.15.

amicably. On the other hand, it is clear that Schröder's government did not wish to repeal the *VW Law*. Instead it strived for the Commission to back away. The same could be said about Lower Saxony, which has vigorously opposed *Porsche's* takeover advances and sought to retain the *VW Law*. The authorities were convinced that the measures are legitimate and serve for legitimate purpose of protecting general public interest, yet the only hindrance for retaining the *VW Law* was the impossible task of convincing the CJEU of its legality. During the infringement procedure the parties argued at cross points, never reaching an agreement on legality of the contested measures.

It has been widely believed that the condemning judgment cleared the way for *Porsche's* ambitions, yet the post-judgment situation was twofold due to the following reasons. Firstly, the judgment could not have legal consequences on *Volkswagen's* statutes, since they were a result of shareholder's agreement and not the *VW Law* (Werlauff 2009; Ringe 2010a). Also the corporate statutes were neither the subject of the infringement procedure nor of the condemning judgment. It was the *VW Law* which was based on *Volkswagen's* statutes and not vice versa. All shareholders of *Volkswagen* approved the statutes by resolution at the time of the company's privatisation. Subsequently, as pointed out by the CJEU, the shareholders are free to decide whether they want to retain provisions of the voting right ceiling in company's statutes.⁴¹⁴ Following the judgment the contested GSs provisions contained in the corporate statutes could only be repealed following the amendment of the said statutes by shareholders' vote at the AGM, so the condemning judgment of the Court would not have a direct impact on effectiveness of *Volkswagen's* corporate statutes. Secondly, the Court's judgment did not automatically result in ineffectiveness of the *VW Law*⁴¹⁵ – in order for its provisions to be fully ineffective it had to be amended or repealed by further legislation by the *Bundestag*. Following the judgment *Porsche*, now the largest shareholder, sought to exercise full control over *Volkswagen* which could potentially mean corporate restructurings, factory closures and re-location of production abroad (Business Week Online 10/01/2007; Automotive News Europe 15/10/2007). It is therefore implicit that the removal of the *VW Law* could have had a potential detrimental effect not only on *Volkswagen's* workforce but also on Lower Saxony's economy and public in general. In theory,

⁴¹⁴ *Volkswagen*, note 46, para.40.

⁴¹⁵ *But see* OECD (2007), *supra* note 307, p.15.

these detrimental effects of the *VW Law* repeal could indicate that the GSs were not merely a ‘symbol’ but an effective shield for defending interest of wider public and Lower Saxony in general and on *Volkswagen’s* employees and Wolfsburg’s economic prosperity in particular.

For Germany it was a difficult time for compliance: firstly, the consequences of *Porsche’s* overhanging threat to end the ‘fat years’ could be felt both on the *Land* and federal scale, secondly the global financial crisis of 2007-2008 was about to unleash. Germany is Europe’s leading power which long had a reputation of the most pro-European MS from the onset, striving for political unity (Rachman 1998: 178, 182; Schmidt 2002: 177). However, from 1998 onwards there was a significant decrease in this strive for unity as the country plunged into budgetary strains and assumed the position of ‘paymasters of Europe’ (Rachman 1998: 184). From 1998 to 2005 Schröder resisted the removal of the *VW Law* since he sought to focus on Germany’s own national interests instead of explicit commitments to Europe. At the time of the judgment Chancellor Merkel took office, and she also has shifted to her predecessor’s policies, increasingly defending national interests while expressing willingness to undertake unilateral actions and contesting EU policy in national politics (Schmidt 2012: 181). The economic crisis of 2008 only re-enforced Germany’s shift to protectionist stance over its national interests as the country felt the increasing burden of rescuing fellow nations (ibid: 181). Against this backdrop the *VW Law*, which assumed a principle of social responsibility at its core with the aim of protecting one of the largest German companies, had to be amended and the authorities’ explicit protection withdrawn – a challenging task indeed.

Yet Lower Saxony remained the second largest shareholder after *Porsche* and a 20% ownership block could allow for some protection – the only challenge was to ensure that the new measure is in line with the Treaty and the Court’s judgment. The government has been caught between Scylla and Charybdis: from one perspective it recognised that provisions of the *VW Law* act as a shield securing the workforce of Lower Saxony (and the economic prosperity of entire purpose-built city of Wolfsburg), from another – it sought to comply with the judgment but with possibility of maintaining some of the control rights vested on Lower Saxony. Given Germany’s power and influence in the EU, the German government could have embarked on the procrastination path full of compliance initiatives and good faith undertakings to eventually comply with the ruling, as for example the Italian

government did. However, notwithstanding the economic pressures of the global financial crisis of 2007-2008 Germany decided to comply, but to comply with precision – in the German way.

7.E: Compliance and New Infringement Proceedings

Two months following the judgment the Commission requested for information on compliance measures and less than three months following the judgment Germany undertook a number of legislative steps towards compliance. On 16 January 2008 the Secretary for Justice Brigitte Zypries introduced the draft Amendment to the *VW Law*.⁴¹⁶ Germany replied to the Commission's enquiry, stating that the necessary compliance measures are being implemented, however it has neither provided the draft text of the Amendment nor further timeframe for its implementation.

The Amendment comprised of the pre-amble, three articles and explanatory notes. It has been later implemented by the *Bundestag* in its original form, effectively removing some of the of *VW Law* provisions. In the pre-amble the government emphasised that the CJEU's judgment must be transposed into national law and contested provisions of the *VW Law* must be repealed and not replaced. Article 1 of the Amendment aimed at giving effect to the Court's judgment by repealing §4(1) and §2(1) of the *VW Law* on director's appointments and the voting right ceiling.⁴¹⁷ In the explanatory notes the government referred to the wording of the CJEU's judgment that instigated the said compliance measure and anticipated its substance. Here the government emphasised that the CJEU's judgment established that by maintaining in force §4(1) as well as §2(1) in *conjunction with* §4(3) of the *VW Law*, Germany has failed to fulfil its obligations under the Treaty provisions on free capital movement.⁴¹⁸ The government specified that it is necessary to comply by repealing provisions which were declared illegal, yet the provisions which were not subject of the proceedings must not be amended.⁴¹⁹

The government then went on stating that the judgment anticipated two necessary amendments: to the appointment right and the deterring *system* which

⁴¹⁶ *Deutscher Bundestag*, Draft law amending the Law governing the transfer of share rights of *Volkswagenwerk GmbH* to private parties of 25/09/2008, 16. Wahlperiode, Drucksache 16/10389, available at: <http://dip21.bundestag.de/dip21/btd/16/103/1610389.pdf>

⁴¹⁷ Draft law, *op. cit.*, p.5.

⁴¹⁸ Draft law, *op. cit.*, Justification, Section A: General provisions, Background and content of the draft, p.6.

⁴¹⁹ *Ibid.*

resulted in joint application of voting right ceiling and increased majority provision.⁴²⁰ The government further clarified that the Court has ruled that the *interplay* of the two paragraphs constitutes a restriction on the capital movement and therefore, in order to comply, the *interaction* of these two provisions §2(1) and §4(3) *VW Law* must be terminated.⁴²¹ In the government's view this requirement is satisfied with the repeal of §2 *VW Law* (voting right ceiling) so that the connection or interaction of the two provisions is effectively terminated. The government additionally emphasised that §2 must be repealed in its entirety since it is contrary to §134(1) *AktG* which does not allow for voting right ceilings for listed companies.

It could be confirmed that when drafting the foresaid compliance measure the government precisely relied on the Court's analysis which assessed the voting right ceiling and increased majority provisions together, explicitly relying on their *cumulative effect*. The government emphasised that since the voting right ceiling *supplemented*⁴²² a legal framework of the increased majority and it is their *joint effect* that has been found contrary to the Treaty, it would comply by following the precise wording of the judgment and repealing one part of the legal framework while retaining the increased majority provision of §4(3) *VW Law* intact. Following the implementation of the proposed Amendment, Lower Saxony's 20% stake would allow it to continue its influence over the company's strategic decisions. Interestingly enough, prior to the infringement procedure, some of the Commission's officials maintained similar views on the issue, supposing that the *VW Law* is illegal due to the *cumulative effect* of its various measures and in case where some of them would be repealed the problem of illegality would be solved (Financial Times 28/01/2004).

Here it should also be recalled that provision of §4(3) has been re-enforced by §4(2) *VW Law* which provided that construction and relocation of factories must be approved by a majority of two thirds of supervisory board. The latter provision effectively re-enforced the employees and Lower Saxony's influence over strategic decisions and it did not become subject to the judgment, so the government was not obliged to repeal it. Another remarkable protectionist feature of the *VW Law* was that provision §4(2) has been further re-enforced by §4(1) on the special right for director's appointments to supervisory board, allowing the *Land* to exert greater

⁴²⁰ Draft law, *op. cit.*, Justification, Section B: Special provisions for Articles 1, 2 and 3, p.6.

⁴²¹ *Ibid.*

⁴²² *Volkswagen*, note 46, para.51.

control on the company. As a consequence, prior to the judgment, the *Land* could have a significant influence on adoption of decisions relating to business re-locations. Nevertheless following the judgment the government has repealed §4(1) *VW Law* and without the *Land*'s extra appointees shareholder's influence on the said board could outweigh the one of the employee representatives and the *Land*, resulting in profit-maximisation/socially undesirable factories re-locations. The government addressed the above issue in its draft Amendment, maintaining that since §4(1) *VW Law* was found illegal by the CJEU it now must be repealed, adding however that under general corporate law the directors' appointments right can still be determined by the company's statutes.⁴²³

The Amendment reveals the government's expressed desire to retain protectionist features of the *VW Law* provisions, such as increased majority, which signifies that these German GSs are of obstructionist character. Likewise, the government's expressed position on the possibility of insertion of directors' appointment provision into *Volkswagen*'s statutes supports this finding. The government obstinately strived to retain provisions of the *VW Law* which could allow it to keep control over *Volkswagen* in order to serve wider societal interests and maintain social responsibility principle applicable for this company. For this reason the Amendment has overturned *Porsche*'s ambitions for breaking close relationships between the company's management and the *Land*, since no factories could be closed without consent of the Lower Saxony and no stringent reforms could go through without its approval. Provisions of the *VW Law* incorporated into *Volkswagen*'s statutes limited *Porsche*'s influence, so assuming that the judgment had an immediate effect on the statutes it sought to delete the overruled provisions from the corporate statutes on the next AGM. Armed with blocking minority Lower Saxony effectively prevented these amendments⁴²⁴ so *Porsche* complained to the District Court of Hannover challenging the unsuccessful move to amend company's statutes.

Following introduction of the Amendment, the EU Internal Market Commissioner Charlie McCreevy publicly confirmed that he is not satisfied with Germany's compliance measures and issued a warning letter to the German authorities – notifying of the violation and urging to comply fully by removing the

⁴²³ Draft law *supra* note 416, Justification, Section B: Special provisions for Articles 1, 2 and 3, p.6.

⁴²⁴ COMP/M.5250, *supra* note 389, n.11.

increased majority provision (Financial Times 10/04/2008, 5/06/2008). The government together with Lower Saxony stated that they will defend the Amendment, emphasising that the state had no obligations to amend the *VW Law* beyond the requirements of the judgment (Financial Times 11/04/2008; Stuttgarter Zeitung 1/06/2008). On 5 June 2008 the Commission proceeded with urgent action, initiating infringement procedure for non-compliance with the judgment on case C-112/05 by issuing a formal letter under Article 260 TFEU (European Commission IP/08/873). The government replied the same day by giving details on the implementation of compliance measures of the draft Amendment to the *VW Law*, stating that the legislative procedure would begin shortly.⁴²⁵ Less than two months following the formal letter, the government provided further particulars specifying the timetable for implementation of the draft Amendment.⁴²⁶

On 1 December 2008 the Commission issued a reasoned opinion under Article 260 TFEU. Germany now had two months for compliance on its own initiative, or the matter could be referred to the Court and deterring penalties applied. Yet Germany firmly held its ground and resisted compliance. A mere ten days following the Commission's reasoned opinion the draft Amendment to the *VW Law* entered into force,⁴²⁷ cementing Germany's determination to retain provisions thereof. At that point Germany explicitly declined the removal of the increased majority provision – in the Commission's view Germany was resisting to comply fully with CJEU's judgment.

The government and Lower Saxony both negatively reacted to the Commission's infringement proceedings by criticising the Court's inexplicit judgment on the *VW* case and the Commission's inability to correctly interpret it. On the other side of the barricades, the infringement procedure for non-compliance has been welcomed by *Porsche*: it became ever confident that the government will comply by removing the remaining provision of the *VW Law*, which prompted it to increase its ownership with a view of increasing it to match the majority control threshold of 75%. Following *Porsche's* move, *Volkswagen's* employees also firmly resisted any possible changes to the *VW Law* by collecting signatures across Europe in support for the provisions (Braunschweiger Zeitung 27/10/2008).

⁴²⁵ Advocate General (2013) Opinion of the AG Wahl delivered on 29/03/2013, Case C-95/12, note 18, para.7.

⁴²⁶ Advocate General (2013), *op. cit.*, para.9.

⁴²⁷ Law of 8/12/2008 amending the Law governing the transfer of share rights of *Volkswagenwerk GmbH* to private parties (*BGBI.* 2008 I No.56, p.2369) entered into force on 11/12/2008.

At this stage it should be emphasised that the situation on Germany's compliance has been further complicated by the two judgments of the District Court of Hannover⁴²⁸ which concerned the case of *Porsche's* challenge to the rejection for amendment of *Volkswagen's* statutes at the AGM. Following the hearing held on 6 November 2008 the District Court of Hannover assessed in great detail the precise wording of the European advocate's opinion alongside the reasoning of the CJEU on *Volkswagen* case C-112/05. Conclusions of the national Court matched the approach of the German government to the necessary compliance measures stemming from the CJEU's judgment. The District Court concluded that from the wording of both judgment and opinion it is not apparent that §2(1) and §4(3) *VW Law* when taken separately are contrary to the Treaty, but it is their *joint effect* which constitutes the breach.⁴²⁹

The national Court maintained that there is a significant difference whether the two provisions infringe the Treaty separately or jointly and the CJEU's choice to issue the ruling which expressly upholds to the measures' joint deterring effect, points exactly to the fact that the measures constitute infringement *only when applied together*.⁴³⁰ The District Court further clarified that choice of words in the CJEU's judgment 'in connection with' is not co-incidental and in legal methodology has a usual meaning that only when the two parameters join together they could be held of having a complete fixed position, as in the case of the *VW Law* having 'a deterrent effect' and constituting a Treaty infringement.⁴³¹

The District Court of Hannover compared provisions of the *VW Law* with other GS judgments, such as *Commission v Netherlands*, *Federconsumatori* and *Commission v Portugal* (C-367/98) and made a distinction between those cases and the one at hand.⁴³² The national Court stated that unlike the provision of increased majority of §4(3) *VW Law*, in the foresaid cases special rights granted to the authorities went beyond their investment in the companies, whereas the 20% ownership of Lower Saxony does not provide for increased influence. The Court also determined that even though *Volkswagen's* corporate statutes emulate

⁴²⁸ Judgment of the first Commercial Chamber of the District Court of Hannover of 27.11.2008 - 21 O 52/08, Judgment of the first Commercial Chamber of the District Court of Hannover of 27.11.2008 - 21 O 61/08.

⁴²⁹ Judgment 21 O 61/08, *op. cit.*, Reasons I 2 (k).

⁴³⁰ *Ibid*, Reasons I 2 (h).

⁴³¹ *Ibid*, Reasons I 2(a).

⁴³² *Ibid*, Reasons I 2 (i).

provisions of the *VW Law* it is doubtful that ineffectiveness of the latter would result in ineffectiveness of the former.⁴³³ To this effect, the District Court concluded that the increased majority contained in the provisions of *Volkswagen*'s statutes shall be maintained until a new resolution is adopted by the company's shareholders, since such provisions are permitted under general corporate law.⁴³⁴ The judgments of the District Court further complicated the case on compliance with the judgment of the CJEU on case C-112/05 which further increased the obstructionist nature of the *VW Law*.

For almost two years following the reasoned opinion issued under Article 260 TFEU, the Commission tried to persuade Germany to repeal the increased majority provision of the *VW Law* and to comply fully. The government, on the other hand, tried to persuade the Commission of its erroneous interpretation of the judgment on case C-112/05 and the necessary compliance measures which it entails. On 17 December 2008 in order to resolve the differing views which it held with the Commission, Germany went as far as proposing to submit a joint application for interpretation of the CJEU's judgment. Following one month of considerations the Commission refused to submit such an application, stating that it has 'no doubts as to the meaning or scope of the 2007 Judgment'.⁴³⁵ Germany resisted compliance and withdrew from negotiations in the summer of 2011.

Following the judgment of CJEU of 2007 on case C-112/05, the rulings of 2008 by the District Court of Hannover and the initiation of the infringement procedure under Article 260 TFEU, *Porsche* hoped that the *VW Law* will fall immediately (Financial Times 8/01/2009). However, due to obstructionist nature of the *VW Law* and Germany's resistance to comply, *Porsche*'s takeover ambitions were shattered in first half of 2009. The tables have shifted as *Porsche* withdrew its takeover ambitions and agreed to merge with *Volkswagen*, becoming its subsidiary (Financial Times 7/05/2009). The half-a-century old *VW Law* has effectively prevented this unprecedented takeover attempt, which lasted for three and a half years. It could be concluded that the frustrated takeover by *Porsche* expressly demonstrates the restrictive character of §4(3) *VW Law* which 'is capable of significantly restricting the movement of capital'.⁴³⁶

⁴³³ Judgment 21 O 61/08, *supra* note 428, Reasons I 3.

⁴³⁴ *Ibid.*

⁴³⁵ Advocate General (2013), *supra* note 425, para.12.

⁴³⁶ *Ibid.*, para.95.

As a response to the Commission's second challenge to the amended provisions of the *VW Law*, stakeholders of *Volkswagen* sought to preserve effectiveness of the measures and defend the Amended provisions of the *VW Law* with the intricate move which has been assumed by the CJEU and the European advocate. At the time of the judicial proceedings on *VW* case both the European advocate and the CJEU confirmed that the increased majority provision is called in question only because it is a state measure and not the expressed will of shareholders.⁴³⁷ Prompted by the line of analysis applied both by the Court and the European advocate, *Volkswagen's* new shareholders,⁴³⁸ have amended the company's statutes accordingly, specifically transposing the contested increased majority provision into the statutes. *Volkswagen's* statutes of October 2011 (which were effective 9 months following the judgment) provide that resolutions by the AGM that are required by law to be adopted by a majority consisting of at least three-quarters of the share capital would require a majority of more than four-fifths of the share capital.⁴³⁹ Another significant development is that at the same AGM the shareholders voted to expressly incorporate the new version of director's appointments into the company's statutes, stating that Lower Saxony is entitled to appoint two members of the supervisory board for as long as it holds at least 15% of the company's shares.⁴⁴⁰ The director's appointment provision incorporated into *Volkswagen's* statutes now specifically provided the necessary ownership of Lower Saxony to be eligible to appoint two directors, cementing the *Land's* influence on decisions in relation to factories' transfers.

As could be seen from the new corporate statutes, the increased majority percentage expressly matches with the ownership of Lower Saxony – the fact which points towards the *Volkswagen's* shareholders' determination to preserve control by Lower Saxony and provisions originally incorporated into the *VW Law*. Equivalent stakeholder-oriented determination applies to the decision to specifically reserve the right for Lower Saxony to appoint two directors on supervisory board. Interestingly enough the participation threshold has been lowered from the actual ownership of

⁴³⁷ Advocate General (2007a), *supra* note 376, para.91; *Volkswagen*, note 46, para.45.

⁴³⁸ *Porsche's* outright takeover bid has long collapsed, *Porsche* itself has undergone a corporate restructuring and was now merging and effectively being taken over by *Volkswagen*, shares which used to be owned by *Porsche* were sold back to *Volkswagen* and to *Qatar Holding*. See e.g., *Financial Times* (15/08/2009).

⁴³⁹ §25 (2) Statutes of *Volkswagen* as at October 2011, available at: www.volkswagenag.com

⁴⁴⁰ §11 (1) Statutes of *Volkswagen*, *op. cit.*

the *Land* by 5%. The approval of the new corporate statutes for *Volkswagen* raises certain important questions voiced, for example, by Hopt (2010: 17) ‘whether obstacles inserted – freely and in conformity with general provisions of company [law]– into the articles of incorporation could still violate the Treaty provisions if they privilege the state as owner’ (also Ringe 2011; Papadopoulos 2012).

In a similar vein, following the incorporation of the *VW Law* provisions into *Volkswagen*’s statutes the question voiced by the European advocate and the CJEU on the fact that provisions of the *VW Law* are not the expression of the shareholders’ will, could not hold true. Shareholders solely by their own will chose to apply provisions of the *VW Law* which were attacked by the Commission and overruled by the CJEU. Yet, as the following motion by the Commission demonstrates, provisions of the *VW Law* incorporated into *Volkswagen*’s statutes could be one of the reasons for referral under Article 260 TFEU.

On 21 February 2012 the Commission brought the action before the CJEU, maintaining that it is apparent from the judgment on case C-112/05 that each of the three provisions of the *VW Law* infringes the Treaty individually.⁴⁴¹ The Commission maintained that “[w]hen implementing a judgment, it is not just the operative part thereof which needs to be taken into account, but also the grounds for the decision. In the context of the present case, it appears particularly far-fetched on the part of the Federal Republic of Germany to try to justify its failure to fully implement the judgment of the Court of Justice exclusively on the basis of the three words ‘in conjunction with’ in the operative part of the judgment.”⁴⁴² The Commission concluded that “[s]uch an interpretation does not only ignore the overall grounds for the judgment, but also the case-law of the Court of Justice [...] on GSs”.

By September 2012 the action was still pending before the CJEU and Germany did not succumb to the Commission’s view on necessary compliance measures. By the end of 2013 the amount of penalties which Germany would be obliged to pay amounted to nearly 80 million euros. Yet, the effect of penalty threat was not deterrent since in response to the second referral the government explicitly confirmed that it does not intend to change the *VW Law* and is ready to defend it before the CJEU (Wall Street Journal 24/11/2011; *Handelsblatt* 20/03/2012).

⁴⁴¹ Case C-95/12 *Germany*, note 18.

⁴⁴² Case C-95/12 *Germany*, note 18.

On 29 May 2013 Advocate General Wahl issued his opinion, rejecting the Commission's complaints regarding Germany's failure to amend *Volkswagen's* statutes by stating that company's statutes were neither put to the Court's scrutiny nor subject to the judgment.⁴⁴³ The European advocate stated that in his view the CJEU's judgment on case C-112/05 is not 'particularly ambiguous' and it is 'regrettable' that the Commission and Germany had contrasting views on its interpretation and could not agree on the necessary compliance measures.⁴⁴⁴ AG Wahl stated that 'a broad interpretation of the 2007 judgment cannot be accepted'.⁴⁴⁵ Following the analysis of the operative part of the judgment the European advocate has sided with Germany⁴⁴⁶ stressing that the present case is not aimed at determining whether or not the increased majority provision could be justified when taken individually, since this issue should be decided under general infringement proceedings of Article 258 TFEU.⁴⁴⁷

On the 22 of October 2013, exactly six years following the condemning judgment on *Volkswagen* case C-112/05, the CJEU issued its verdict on the case of alleged non-compliance with the foresaid judgment (Case C-95/12).⁴⁴⁸ The Court followed the arguments of the European advocate and the District Court of Hannover, concluding that *Volkswagen's* statutes were not subject to the judgment, so the government was not obliged to amend them in order to comply.⁴⁴⁹ The CJEU also confirmed that the deterrent effect of the voting right ceiling of §2(1) *VW Law* have to be assessed jointly with the increased majority provision of §4(3) *VW Law* so their *cumulative* effect amounts to infringement of the Treaty.⁴⁵⁰ The CJEU concluded that by retaining the increased majority provision Germany has not failed to comply with the judgment on *Volkswagen* case C-112/05.⁴⁵¹

To this day the directors' appointments right as well as increased majority provision of §4(3) *VW Law* remain in force. The issue of the legality of the latter provisions remains open: in the future they could be challenged before the CJEU under separate infringement proceedings under Article 258 TFEU. The way in

⁴⁴³ Advocate General (2013), *supra* note 425, para.20.

⁴⁴⁴ *Ibid*, paras.24-25.

⁴⁴⁵ *Ibid*, para.26.

⁴⁴⁶ *Ibid*, para.28-47.

⁴⁴⁷ Advocate General (2013), *supra* note 425, para.54.

⁴⁴⁸ Case C-95/12 *Germany*, note 18.

⁴⁴⁹ *Ibid*, para.24.

⁴⁵⁰ *Ibid*, paras.41-52, (emphasis added).

⁴⁵¹ *Ibid*, para.52.

which the Court shall address this issue remains to be seen, yet it could be ascertained that the highest legal authority of the EU is on thin ice while verging into ambits of national corporate and private laws.

Concluding Analysis and Remarks

One of the oldest instances of protectionist GSs – the *VW Law* – differs considerably from other such measures, so do the compliance obligations stemming from the judgment of the CJEU and the final compliance outcome. Germany's compliance with the judgment on *Volkswagen* case could be seen as twofold, causing much controversy. The diverging views on necessary compliance measures by the Commission and Germany brought the whole issue into a new light. In spite of the judgment on the alleged non-compliance in case C-95/12 it is not precisely clear whether Germany could be seen as have complied in good faith or not. The outcome of the judicial procedure for non-compliance with *Volkswagen* judgment confirmed that the government has complied, yet it is unclear whether it could have acted contrary to the good faith obligation by retaining allegedly illegal GSs provision of the *VW Law*.

On one hand, Germany's conduct during the infringement procedure under Article 258 TFEU, its timely replies to the Commission's correspondence and implementation of rapid compliance measures post-judgment signify that it has good-mannerly strived for compliance. The government has rapidly initiated compliance by duly repealing the exclusive voting right ceiling and director's appointment rights without unnecessary procrastination and any further amendments or justifications thereof. Such determination for irreversible repeal of two of the condemned provisions could be seen as compliance in line with the good faith obligation. The fact that Germany offered to the Commission to submit a joint application for interpretation of the *Volkswagen* judgment further supports the good faith compliance inclination, even though the European advocate has criticised the government's failure to submit the foresaid application on its own motion.⁴⁵² All of the above could point towards Germany's inclination to comply with the judgment on case C-112/05 in good faith.

On the other hand, following the judgment on *Volkswagen*, Germany openly and expressly refused to succumb to the Commission's views on the necessary

⁴⁵² Advocate General (2013), *supra* note 425, para.87.

compliance measures and retained the increased majority provision which allows for Lower Saxony to execute increased controlling powers over the company, so the deterrent nature of §4(3) *VW Law* should not be underrated. It is highly unlikely that Lower Saxony would ever dispose of its stake in *Volkswagen*, meaning that the 20% blocking minority will effectively allow it to prevent any takeover or unwelcome restructuring of the company and appoint two directors onto company's board. In case if the CJEU establishes that the increased majority provision of the *VW Law* is contrary to the Treaty, Germany's desire to retain the provision could be seen as acting contrary to the sincere cooperation obligation. Such scenario would confirm the obstructionist nature of GSs. This could be due to the fact that in spite of the ambiguity of the *Volkswagen* judgment the compliance measures which were expected from the German government were quite 'straightforward' – the *VW Law* had to be repealed in its entirety without any reservations made to the increased majority provision. What is more, despite the fact that compliance has been initiated immediately following the judgment, the draft Amendment came into force fourteen months after the judgment, which could be seen as too late to qualify as compliance in good faith. Above all, the mere fact that the *VW Law* remained enacted for more than four decades points to obstructionist nature of these GS measures. This signifies that the GSs have the tendency of being obstructionist while in some instances the non-compliance with the Treaty provisions on capital movements tends to persist despite the condemning judgment on GSs.

The Commission has accepted the decision of the CJEU in case C-95/12 and closed the infringement case for non-compliance with the CJEU's judgment on *Volkswagen* case. However, theoretically, the author envisages that the controversial provision of §4(3) *VW Law* could become subject to further infringement procedure under Article 258 TFEU, however practically such scenario would be unlikely, due to the following reasons. Firstly, the Commission is ever more cautious to challenge provisions of the *VW Law* which are cemented in *Volkswagen's* statutes and are acceptable under general company law. The Commission's desire to stretch the *Volkswagen* judgment to apply to company's statutes has been rightfully found inadmissible by the CJEU and could be seen as overzealous, verging too far into the ambit of national corporate and public law. In this regard the Commission could be on thin ice, especially if it will choose to challenge the provisions of *Volkswagen's* statutes which have incorporated the increased majority ceiling for the inexplicit

benefit of Lower Saxony also explicitly granting it with the right to appoint two directors. Such a move could provoke unprecedented resistance to the EU policy-making in general (Höpner, Schäfer 2007: 9). The legality of such state interventions has not been questioned just yet, and only the future could show how and if the Commission will address this issue. Secondly, it seems that the Commission and the CJEU are now more cautious in pressing for ‘more Europe’ and the *VW Law* is unlikely to be challenged in the near future. It is important to emphasise that given the Commission’s clear-cut position on the issue and its expressed opposition to perceived legality of retained GS measures, Germany could be seen as acting contrary to the sincere cooperation obligation. Such conclusions are of hypothetical nature, at least until the Commission challenges the retained paragraphs of the *VW Law*. Consequently what is clear from the outcome of compliance with judgment on case C-112/05 is that *Volkswagen*’s shareholders prefer a corporate governance model that may hinder the free movement of capital, because it emphasises the interests of the providers of other types of capital, such as human capital (Gerner-Beuerle 2012: 98).

To conclude, it should be emphasised that Germany’s compliance was neither influenced by the pressure to comply from below, nor by the high costs of non-compliance or by reputational/electorate losses. Firstly, the general public has sided with the national authorities on the issue since the *VW Law* was widely seen as protecting national interests and social responsibility principle which is still deeply rooted in German society. In the electorate’s view the government and Lower Saxony are seen as remaining true to their commitment to retain prevalence of the social responsibility principle and employee orientation in *Volkswagen* while shielding the company from unwelcome challenges of the market-oriented business optimisation. This approach could have contributed to the potential obstructionist nature of the *VW Law*, which in fact strengthens stakeholders’ control over the company’s management. Secondly, the EU-wide reputational losses for non-compliance would neither be applicable to this case, since Germany was extensively burdened with the important task of bailing out fellow MSs – its non-compliance with the controversial judgment on GSs would not be seen as significant fault towards its obligations under the Treaty.

The revealed obstructionist nature of the *VW Law* as well as government’s twofold compliance with the *Volkswagen* judgment signifies that Germany is

reluctant to let go of GSs so the issue is not easily overcome: the *VW Law* could remain on the Commission's and the CJEU's radars for many years to come. The compliance with present judgment presents considerable implications to the hypothetical compliance hypothesis of obstructionist protectionism developed in this study. The government could be seen as cooperating with the Commission at all stages of the enforcement action, both during the infringement proceedings under Article 258 TFEU and under Article 260 TFEU. Yet at the same time, Germany's resistance to succumb to the Commission's demands and expressed disregard of the 'ever closer union' idea which would imply that the remaining protectionist barriers must be removed, signifies that Germany resisted to comprehensively comply and embark on the wider policy change. Such resistance to move towards an 'ever closer union' maxim and repeal controversial provisions of the *VW Law* appears to be a political choice. Since the judgment under Article 260 TFEU procedure has been not in the Commission's favour, the effectiveness of the said enforcement mechanism is not under question, so the second enforcement effectiveness hypothesis (H2) does not apply in this case. Given that the government initiated timely amendments following the judgment under Article 258 TFEU it could be concluded that the said enforcement mechanism has been successful in facilitating effective compliance. However, the amended law came into force fourteen months following the judgment, which is too late to qualify as compliance in good faith, so in this case the core enforcement effectiveness/obstructionist hypothesis (H1) would be confirmed. Since in this case the MS complied 'by amendment' and the subsequent judgment under Article 260 TFEU proved that Germany has not failed to comply, the supporting hypothesis on effectiveness of minimalist compliance (H1a) could be falsified. Consequently, it should be emphasised that the outcome and legality of such compliance measure is not a clear-cut matter. The mere possibility that the Commission could challenge the amended laws in the future would point to the inherent obstructionist nature of GSs at issue. What the compliance outcome with the *Volkswagen* case confirms is that the legal maxim 'that he who can do most can also do least'⁴⁵³ could also apply to compliance with GS-related judgments.

⁴⁵³ Case C-463/00 *Spain*, note 19, para.41.

8. Portugal: Obstructionist Privatisation Law No.11/90 as Protection for National Champions

This chapter assesses Portugal's practice in complying with GS judgments, encompassing some of the most recent rulings delivered in 2010 and 2011. The corresponding analytical approach is applied by first reflecting on the background of GSs and then assessing post-judgment compliance. Introduction reveals the obstructionist privatisation law which became subject to the infringement proceedings in all four Portuguese cases. Throughout the analysis particular emphasis is given to Portugal's determination to actively employ GSs. The compliance assessment will culminate with the conclusive part encompassing measures aimed at simultaneous compliance with the three GS-related judgments. This chapter will reveal that Portugal has been successfully substituting overruled GSs with new protectionist provisions, resisting comprehensive compliance and resorting to obstructionist protectionism.

Introduction on Jurisdiction and its Golden Share Law

The Portuguese state's involvement in operating of industry and strategic companies is similar to practices applied in Italy and Spain, as all these MSs share the authoritarian past with strong traditions of state *dirigisme*. Yet contrary to Spanish dictator Franco, who established economic control via widespread nationalisations of strategic companies, Portugal's ruler Salazar refrained from industry nationalisation (Bortolotti, Milella 2006: 8; Jordana *et al* 2005; Vickers, Wright 1989: 11). Nationalisations came much later as a result of 1974 Revolution and democratisation, dramatically expanding public ownership and placing control over strategic companies directly onto the state. The government has produced, redistributed and regulated public services such as energy and telecoms, while state ownership has been constitutionally protected.⁴⁵⁴ Portugal's protectionist tradition has a recent yet solid foundation that 'stands out as a case where public commitment to the role of the state in the economy to public services and to redistributive and egalitarian policies seems particularly strong in a comparative context' (Magalhães 2012: 310). Following the democratisation, Portugal strived to join the EU, which

⁴⁵⁴ OECD (2003), *supra* note 25, p.79.

meant that government involvement in national industries had to be considerably reduced.

The perspective of European membership acted as catalyst for liberalisation of strategic industries. The EU Commission recognised that it is necessary to aid Portugal's liberalisation ambitions and implemented the Act of Accession in 1985, allowing the state to maintain a prior administrative approval regime which applied exclusively to foreign direct investments outside the credit institution sector.⁴⁵⁵ The foresaid concession allowed Portugal to control capital influx and prevent inherent takeover threats following the accession to the EU in 1986.

Initially the state could dispose of limited amount of shares while acquisitions by private and foreign companies were also restricted by law.⁴⁵⁶ This cautious approach to privatisation aimed at gradually shaping of the corporate ownership structures of emerging private companies and to create stable shareholder groups. Yet, on the 1st January 1990, following the expiry of concessions guaranteed by the Act of Accession, national companies could be exposed to unwelcome foreign takeovers. This is when and why the government implemented the law on privatisation or the LQP⁴⁵⁷ which allowed for creation of wide-ranging GSs. Article 3 LQP established objectives for re-privatisation: to increase competitiveness of companies, restructure industries, strengthen national businesses capacity, allow Portuguese citizens to participate in the capital of companies and to preserve property [financial] interests of the state and to develop other national interests. Essentially, the LQP aimed at strengthening of national champions and promoting their competitiveness via implementation of further decree-laws which would administer transformation of SOEs to private companies.

Pursuant to the LQP the decree-laws could: establish acquisition ceilings limiting the rights of any entity to acquire shares above certain threshold (Article 13(2)); limit rights of foreign companies to acquire shares and fix maximum foreign participation in share capital of privatised companies (Article 13(3)); create GSs by attaching special rights to 'privileged' share or the co-called *acções privilegiadas* (Article 15(1)). Pursuant to the LQP, GSs could be created in exceptional cases and

⁴⁵⁵ Articles 221, 222 and 231 of the 'Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties', of 1985 OJ. L302/23.

⁴⁵⁶ Law No.84/88 of 20/07/1988 on Transformation of public undertakings into stock undertakings, (*DoR I* Seria-A, Nr.166/88).

⁴⁵⁷ *Lei Quadro das Privatizações* or Framework Law for Privatisation of 5/04/1990 No.11/90 (*DoR I*, Series-A, No.80).

where grounds of national interest so require in order to safeguard the public interest. The GSs could grant a state-appointed director with the special right to approve resolutions relating to certain matters. Additionally, according to Article 15(3) LQP, the decree-laws could ‘in exceptional cases, where grounds of national interest so require’ create GSs for the sole benefit of the state allowing it to veto certain resolutions and amendments to company’s statutes. The LQP established that penalties for breach of the set ownership/acquisition ceilings could result in compulsory sale of shares exceeding the thresholds, loss of voting rights conferred by those shares or invalidity of such acquisitions or subscriptions.

The above provisions reveal that the LQP created a special framework for privatisation which had to commence via further decree-laws which in turn could create GSs. By means of the LQP the government sought to preserve other national as well as its own interests, and wide-ranging and flexible protectionist provisions of the LQP aimed at addressing those governmental concerns allowing it to both roll back the participation of the state in national economy, pay its debts, yet at the same time to stay in control over newly privatised SOEs by strengthening their positions and not allowing for market forces to decide on their faith.

Equipped with such an arsenal of GSs the government could safely continue to privatise strategic companies such as energy giants *GALP Energia* and *Electricidade de Portugal (EdP)*, telecom monopoly *Portugal Telecom (PT)* and the country’s largest cement producer *Cimentos de Portugal (CIMPOR)*. The LQP allowed for these companies to extend business abroad to ‘natural markets’ – former colonies in Latin America – becoming multinational companies and largest national champions. Provisions of the LQP and ‘enabling’ decree-laws would become subject to condemning rulings by the CJEU, compliance with which will be analysed in the following sub-chapters.

For the purpose of this overall introduction it is imperative to stress that Portugal was greatly supportive of European integration while significantly benefiting from injections from European structural funds and capital influx. However, following its accession to the EU and adoption of single currency, the enthusiasm for liberalisation ran dry – there was no more ‘demand’ and pressure for further incentives and reforms (Goucha, Soares 2010; Royo 2013: 202). Portugal’s resistance to aims of the free market will be observed throughout current chapter

revealing protectionist stance over the strategic companies and obstructionist non-compliance with EU law which sought to overturn such protectionist practices.

According to studies on compliance, Portugal could be seen as one of the leaders for non-compliance in spite of its relatively small bargaining power and political weight (Börzel 2001: 818; Börzel *et al* 2010; 19). At the same time, similar to Spain, Portugal does not generally persist in non-compliance seeking to remedy the breach prior to the referral to the Court (ibid Börzel 2001). However, similar to the extreme position applied by Italy, qualitative analysis of the Portuguese compliance with GS rulings will demonstrate that while being highly supportive of European integration, Portugal could be seen as reluctant to comply in good faith. The following analysis will reveal that when it comes to GSs the Portuguese government goes to great lengths to resist compliance. In all analysed GS cases, compliance has only been achieved after considerable procrastination and implementation of numerous inadequate compliance measures in response to penalty procedures for non-compliance and even as a result to an internationally induced pressure.

8.1. Discriminatory Golden Shares for National Champions

This sub-chapter analyses compliance with judgment on case C-367/98 which was one of the three GS rulings delivered by the CJEU on 4 June 2002.⁴⁵⁸ In those landmark rulings the Belgian regime has been justified, while both French and Portuguese GSs were found to be in breach of the Treaty. Prior to the ruling on Portuguese GSs both the Commission and the Court had an opportunity to reflect on the restrictive nature of the LQP provisions in important proceedings⁴⁵⁹ under Article 21 of the Merger Regulation.⁴⁶⁰ These cases relate to case C-367/98 in fact, as they concerned the government's application of GSs and imposition of veto on cross-border deals involving foreign investors. Assessment of these cases will reveal how the GS provisions of the LQP could be applied to block unwelcome cross-border capital movements. The government's conduct during these cases will reveal an openly protectionist stance and determination for maintaining GSs in spite of the ongoing infringement proceedings.

It is sufficient to note that case C-367/98 is significant for the development of the GS jurisprudence for two reasons. Firstly, it was the first GS ruling in which the CJEU confirmed that protection of general financial interests cannot constitute adequate justification.⁴⁶¹ Secondly, the CJEU established that mere undertaking not to apply existing provisions cannot justify their continuous existence as it could be liable for creating uncertainty.⁴⁶² The latter development confirms the fact that in spite of supremacy of EU law over national provisions, GSs have to be repealed in order to fully exclude their dissuasive effects on potential investors.

This sub-chapter proceeds as follows: Section 8.1.A reveals GSs and Section 8.1.B assesses their application to block cross-border deals. Portugal's actions during pre-litigation stage will be analysed in light of unsuccessful compliance attempt and contrasted with the government's application of GSs to veto cross-border deals. It will be concluded that, in spite of the on-going challenge of GSs under infringement procedures and in spite of the political commitments not to

⁴⁵⁸ Case C-483/99 *France*, note 52; C-503/99 *Belgium*, note 53.

⁴⁵⁹ European Commission Decision (20/07/1999) Case IV/1616 - *Champalimaud/Banco Santander Central Hispano-americano*; European Commission Decision (22/11/2000) No.COMP/M.2054 – *Secil/Holderbank/Cimpor*; 3543 final-PT.

⁴⁶⁰ Council Regulation 139/2004 EC, *supra* note 232.

⁴⁶¹ Case C-367/98 *Portugal*, note 29, paras.44&52.

⁴⁶² *Ibid*, para 41.

employ GSs, the government has effectively used GSs. Parallel examination of government's determination to defend existence and exercise of GSs will signify the measures' obstructionist nature as well as the state's expressive incline towards non-compliance. Section 8.1.C assesses the potential for compliance with the judgment on case C-367/98. Section 8.1.D assesses compliance situation and summarises that Portugal has acted in bad faith and resorted to non-compliance. This section concludes with insights into obstructionist provisions of the LQP which were not scrutinised in case C-367/98 and which could become subject to subsequent infringement proceedings.

8.1.A: Golden Shares

Pursuant to enabling provision of Article 13(3) LQP the government has implemented at least fifteen GS decree-laws setting different ownership ceilings for foreign acquisitions in various companies, capping foreign investments to between 5% and 40%.⁴⁶³ Also pursuant to the LQP, the government implemented DL No.380/1993⁴⁶⁴ establishing a special procedure for monitoring of share ownerships in privatised companies. Pursuant to the preamble of DL No.380/1993 'in light of past experiences and due to the strategic importance of companies to be privatised *for the national economy*, the government considers it is essential to facilitate the follow-up control on the shareholding structures of those companies with a view to strengthen their efficiency and business capacity, in a way that is consistent with *economic policy guidelines*'.⁴⁶⁵ Therefore, the follow-up control mechanism effectively allowed the government to exercise *de jure* and *de facto* control of shareholder structure of its former SOEs.

To this effect, Article 1 of DL No.380/1993 created an ownership ceiling subjecting any investor, foreign or national, wishing to acquire more than 10% of voting capital in a company which is being privatised, to obtain prior administrative approval from the Minister of Finance. The approval will be subject to specific conditions laid down by further decree-laws for each particular case of state ownership disposals. Pursuant to Article 4(2) DL No.380/1993, the approval has to be issued within thirty days of receiving the application and shall be based on objectives pursued by re-privatisation in accordance with Article 3 LQP. Regarding

⁴⁶³ See relevant paragraphs of Case C-367/98 *Portugal*, note 29.

⁴⁶⁴ Decree-Law No.380/93 of 15/11/1993 (*DoR I*, Series-A, No.267).

⁴⁶⁵ *Ibid*, p.6362-(2), (emphasis added).

the non-discriminatory system of approval enshrined in DL No.380/1993, it should be emphasised that the Minister of Finance was left with an exceptionally wide margin of discretion which would enable him to unilaterally decide whether a potential acquirer ‘fits’ the government’s policy on re-privatisations. There is no expressive *fit-and-proper test* available under provisions of DL No.380/1993 while the objectives of the LQP, such as strengthening capacity of national businesses and ensuring the preservation of interests of the state are of imprecise and wide-ranging character.

Provision of Article 13(3) LQP has been further activated by the DL No.65/1994⁴⁶⁶ which established a new ownership ceiling that applied exclusively to foreign investments. DL 65/1994 limited foreign participation to 25% in national companies whose privatisation procedure has already been completed, unless a higher threshold has been previously determined by a company-specific privatisation decree-law.

8.1.B: Application of Golden Shares and Associated Infringement Procedures

The Portuguese GSs have attracted attention of the EU Commission in 1992. The Commission issued a formal letter on 4 July 1994 to which Portugal replied on 28 September 1994, maintaining that the LQP and associated decree-laws are of exceptional importance ‘from a historical, political and financial point of view’ since their implementation made the whole re-privatisation process possible.⁴⁶⁷ In its reply the government had also undertaken not to employ the restrictions on acquisitions based on nationality of investors for future privatisations, so that EU investments would not qualify as ‘foreign’ under provisions of the LQP and DL No.65/1994.⁴⁶⁸ The government also maintained that the foresaid political commitment is further reinforced by the national Constitution, which provides that EU law will take precedence over conflicting Portuguese provisions.⁴⁶⁹

On 29 May 1995 the Commission issued a reasoned opinion, allocating two months for compliance. The Portuguese authorities replied on 7 September 1995 reiterating their commitment not to apply discriminatory provisions of the LQP and relevant decree-laws to EU investors while at the same time stressing on the

⁴⁶⁶ Decree-Law No.65/1994 of 28/02/1994 (*DoR*, Series I A, No. 49 of 28/02/1994, p.933).

⁴⁶⁷ Advocate General (2001), note 296, para.26.

⁴⁶⁸ *Ibid*, para.27.

⁴⁶⁹ *Ibid*.

importance of DL No.380/1993 to the success of ongoing re-privatisation process.⁴⁷⁰ The government intended to refrain from implementation of such discriminatory measures in future privatisations, leaving the existing discriminatory provisions applicable. Essentially, the government's reply implies that the system of approval under DL No.380/1993 is a legitimate instrument which is justified by the objectives of re-privatisation.

Following the expiry of compliance period allocated in the reasoned opinion, the Commission could have brought the matter to the CJEU starting from April 1995. Yet the matters remained silent following the Portuguese reply. One of the possible reasons for the Commission's inaction on the matter could lie in compliance measures envisaged by the Portuguese government. The Ministry of Finance has drafted a new DL No.24/1996,⁴⁷¹ which established a new legal framework applying to EU investors participating in national companies that are in the process of privatisation or where privatisation has already been completed.

According to the preamble, DL No.24/1996 aimed at allowing further development of objectives enshrined in the LQP while bringing provisions of Article 13(3) LQP in line with the 'new realities of economic globalisation'.⁴⁷² The preamble further ascertains that pursuant to enabling Article 13(3) LQP several decree-laws were implemented limiting foreign participation in companies, however 'the evolution of the national privatisation programme and deepening of the European integration process' determines the necessity to reformulate the present provisions.⁴⁷³ Further, the preamble declares that 'given the evolution of the commitments of the Portuguese State, as a Member of the European Union', it is appropriate to amend the way in which Article 13(3) LQP would apply in the future.⁴⁷⁴ Basically, DL No.24/1996 reiterated political commitment not to employ discriminatory provisions as already expressed by the government during the infringement proceedings. To this end, the sole Article of DL 24/1996 further established that provisions of Article 13(3) LQP would not apply to EU entities. Despite the fact that DL No.24/1996 merely reiterated the government's earlier political commitments, the Assembly of the Republic refused to ratify it on 28 May

⁴⁷⁰ Case C-367/98 *Portugal*, note 29, para.18.

⁴⁷¹ Decree-Law No.24/96 of 20/03/1996 (*DoR I*, Seria-A, No.68/96, pp.546-547).

⁴⁷² *Ibid*, p.546.

⁴⁷³ *Ibid*.

⁴⁷⁴ *Ibid*.

1996.⁴⁷⁵ Provision of DL No.24/1994 (as well as other company-specific decrees which limited foreign participation in each particular case of privatisation) continued to apply to EU investors.

Infringement proceedings challenging provisions of the LQP and relevant decree-laws were put on hold until 1997 Communication,⁴⁷⁶ when the Commission confirmed its position on incompatibility of GSs with fundamental freedoms of the Treaty. Particularly, the Commission confirmed that system of approval for acquisitions of shares or voting capital must be considered as a restriction on direct and portfolio investments. Since DL No.380/1993 clearly established such system, the Commission decided to refer Portugal to the CJEU on 11 December 1997, lodging an application on 14 October 1998 (European Commission IP/97/1111).

At the time when the case C-367/98 was pending before the CJEU, Portugal continued re-privatisations granting itself special rights in companies pursuant to the LQP. The Minister of Finance Pina Moura specifically confirmed that the government will protect strategic companies following their privatisation and that losing control over strategic companies such as *EdP*, *PT* and *CIMPOR* 'is out of the question' and that Portugal was not prepared to accept lesser rights than other EU MSs (Financial Times 7/06/2000). Even though many such GSs were created, none of them were officially exercised up until 1999 (Financial Times 12/04/1994). However, the Minister Moura soon had an opportunity to confirm protectionist stance with direct actions on 18 June 1999, imposing veto on cross-border deal which involved a Spanish *Banco Santander* acquiring stakes in certain Portuguese financial companies (*BSCH/Champalimaud* case).⁴⁷⁷

Pursuant to DL No.380/1993 the Minister imposed veto by capping *Santander's* voting rights at 10% (European Commission IP/99/773). The Commission issued a decision ordering the Portuguese government to withdraw its veto and initiated the accelerated infringement proceedings under what is now 258 TFEU. The Commission stated that Portugal is 'blatantly infringing [EU] law' by employing special rights which are contrary to the Treaty freedoms.⁴⁷⁸ The

⁴⁷⁵ Resolution of AR 19/1996, Refusal of approval of Decree-Law No. 24/96 of 20/03/1996 (*DoR I*, Series-A No.124 of 5/28/1996).

⁴⁷⁶ European Commission (1997), *supra* note 77.

⁴⁷⁷ European Commission Decision (20/07/1999), *supra* note 459; European Commission (IP/99/773); *see* HARKER (2007), p.509; *also* BENYON (2010), p.43.

⁴⁷⁸ European Commission Decision (20/07/1999), *supra* note 459; European Commission (IP/99/669).

BSCH/Champalimaud case did not make it to the CJEU, Portugal did not comply with the Commission's decision and the vetoed deal was eventually modified to become more government-friendly (Benyon 2010: 43). However this is a great example for demonstrating how Portugal could successfully employ GSs implemented pursuant to DL No.380/1993 to oppose a cross-border deal.

Even though the Commission clearly expressed its views on illegality of Portugal's veto in *BSCH/Champalimaud* case, the Minister of Finance Moura repeatedly used the GSs in June and again in August 2000. This time, both vetoes applied to a cross-border deal involving *CIMPOR* – a cement company.⁴⁷⁹ *CIMPOR* was subject to approval system pursuant to DL No.380/1993 and pursuant to Article 15(3) LQP the state has also retained GSs. On 15 June 2000 *CIMPOR* became subject to takeover bid by *Holderbank/Secil* – Swiss and Portuguese companies – which demanded governmental approval of the acquisition pursuant to DL No.380/1993, removal of GSs provisions from *CIMPOR*'s statutes and disposal of remaining GSs.⁴⁸⁰ The Minister refused to satisfy *Holderbank/Secil*'s demands and vetoed the deal.⁴⁸¹ *Holderbank/Secil* submitted an amended application, yet the Minister once again vetoed this acquisition. *Holderbank/Secil* applied to the authorities once again with a reviewed public offer making further concessions, yet their application has been refused – the takeover bid for *CIMPOR* has collapsed.

Following the foresaid application of GSs the Commission issued a binding decision ordering Portugal to comply with EU law by withdrawing unjustified veto.⁴⁸² The Commission rightfully observed that the veto could not be justified by any legitimate interests, so it is a barrier to free movement of capital and establishment.⁴⁸³ However, the Portuguese government did not withdraw its veto decisions. Instead the government proceeded with challenging the Commission's decision by lodging an application before the CJEU.⁴⁸⁴ Portugal claimed that the Commission did not have the competence to rule on legitimacy of veto, but should have referred the matter to the CJEU instead, which in turn would have assessed

⁴⁷⁹ Case No.COMP/M.2054, *supra* note 459; also HARKER (2007), p.511; BENYON (2010), p.43; *Financial Times* (13/07/2000).

⁴⁸⁰ Case No.COMP/M.2054, *supra* note 459, paras.4-6.

⁴⁸¹ See e.g., *Financial Times* (7/06/2000).

⁴⁸² Case No.COMP/M.2054, *supra* note 459, para.58.

⁴⁸³ *Ibid*, paras.54-55&58.

⁴⁸⁴ Case C-42/01 *Commission v Portugal* [2004], Judgment of 22/06/2004, ECR I-06079 and Advocate General (2004) Opinion of the AG Tizzano on the C-42/01, delivered on 22/01/2004, ECR I-6082.

legality of national measures under Article 258 TFEU. It should be emphasised here, that should Ministerial veto be challenged before the CJEU, the government could not by any means defend this measures by invoking any of the justifications permitted under the Treaty – *CIMPOR* was a cement company, which did not provide services of general public interest.

In a nutshell, the *BSCH/Champalimaud* and *Holderbank/Secil/CIMPOR* cases demonstrated how provisions of non-discriminative ownership ceiling of DL No.380/1993 could be applied and how the Portuguese government could apply it to block unwelcome cross-border acquisitions. These cases reveal how Portugal had openly ignored the Commission's calls for compliance, resorted to obstructionist non-compliance while acting contrary to the sincere cooperation obligation. Portugal's conduct clearly reveals the inherent obstructionist nature of the decree-laws implemented pursuant to the LQP, as well as the government's incline to resist compliance when security of its prized companies is at stake. Contrary to GSs in credit and cement-making companies discussed above, special rights in companies which operate in strategic sectors might eventually be justified. However as seen from the application of non-discriminatory approval regime of DL No.380/1993, such provisions could particularly target foreign acquisitions, leaving a wide discretion to the government.

Discriminatory provisions of DL No.24/1994 and Article 13(3) LQP as well as non-discriminatory DL No.380/1993 were scrutinised by the CJEU in case C-367/98. As regards the discriminative measures Article 13(3) LQP and DL No.24/1994 Portugal did not deny the infringement in principle and the only justification put forward was the political commitment not to employ these provisions to EU investors.⁴⁸⁵ In any event, Portugal claimed that GSs would not apply to EU investors due to direct effect and supremacy of EU law.⁴⁸⁶ As regards the non-discriminatory approval regime of DL No.380/1993 the government agreed that it falls within the scope of free capital movement, claiming however that these measures are justified by overriding requirements to safeguard general financial interest of the state.⁴⁸⁷ The Portuguese government's defence strategy seems to be particularly inadequate taken the imposed veto in *BSCH/Champalimaud* and *Holderbank/Secil/CIMPOR* cases, which demonstrated that GSs could be applied to

⁴⁸⁵ Case C-367/98 *Portugal*, note 29, para.29.

⁴⁸⁶ *Ibid*, para.29.

⁴⁸⁷ *Ibid*, paras.30-32&43.

EU investments. The CJEU concluded that the need to safeguard economic objectives could not be accepted as a legitimate justification of provisions at issue.⁴⁸⁸ On 4 June 2002 the Court has ruled that provisions of Article 13(3) LQP together with company-specific decree-laws enacted pursuant to it, as well as DL No.24/1994 and DL No.380/1993 are contrary to the Treaty. Following the judgment, Portugal had to repeal or justify the overruled provisions in order to comply.

8.1.C: Assessing Potential Compliance

From the onset it should be established that during the compliance bargaining stage of the infringement procedure Portugal and the Commission have argued at cross points: the former emphasised on the objectives behind the contested measures from historical, political and financial points of view, while the latter emphasised on their dissuasive nature. Since the government has committed not to apply discriminatory measures to EU investors in relation to future privatisations, it could be assumed that Portugal would make certain concession towards compliance. But the wording of Portuguese concessions implied that discriminatory measures would not apply only in relation to future privatisations, the already implemented company-specific decree-laws pursuant to Article 13(3) LQP and DL No.24/1994 would stay in force, effectively blocking foreign investment.

Given the government's readiness to commit twice to such political concessions at the time of the infringement proceedings it could be assumed that Portugal accepts the deterrent effect of discriminatory measures. This could imply that during judicial review the legality of discriminatory measures would not be expressly defended by the state. In fact, at the hearing Portugal admitted the alleged infringement in principle, while putting an accent on its political commitment not to apply discriminatory measures to EU investors while at the same time reiterating the historical and economic objectives behind the provisions.⁴⁸⁹ *Prima facie* it could be concluded that the discriminatory national measures lacked on obstructionist qualities in principle and following the judgment they could be repealed without delay. However the refusal to ratify DL No.24/1996, which aimed at amending the measures in question, demonstrates inherent obstructionist nature of provisions of Article 13(3) LQP. Despite pre-judgment commitments in case C-367/98 and

⁴⁸⁸ Case C-367/98 *Portugal*, note 29, para.52.

⁴⁸⁹ *Ibid*, para.29.

reiteration of the same at the hearing, there was no inclination from Portugal to repeal the discriminatory measures post-judgment. Compliance measure of DL No.24/1996 has not been ratified pre-judgment, however following the condemning judgment there was enough motivation for Article 13(3) LQP and DL No.24/1994 to be finally revoked. Analysis of Portugal's conduct in application of GSs to block cross-border deals signifies that numerous political commitments could not be taken as a sincere inclination to comply in good faith and the infringement could continue post-judgment.

When it comes to good-natured compliance in relation to DL No.380/1993 it is a different matter when compared with the discriminatory provisions discussed above. Back at the pre-judicial stage the government did not make any political commitments in relation to the approval regime, stating that it applies equally to all investors. There was no inclination to remove the measures in question, or amend them, as was the case with provisions of Article 13(3) LQP and other discriminatory decree-laws. At the pre-litigation stage of the infringement procedure and at the hearing the parties argued at cross points: Portugal insisted on importance and necessity of the measures justifying them by a number of illegitimate objectives. Such pre-judgment behaviour implies that following the judgment the Portuguese authorities would most likely opt to comply 'by amendment' in order to retain such important piece of protectionist legislation. As the supporting hypothesis on minimalist compliance (H1a) suggests, any such compliance strategy have a significant potential of being insufficient and inadequate, which in turn places the question of effectiveness of the enforcement action under Article 258 TFEU, hence confirming the first main hypothesis of this study (H1).

The government also used GSs and defended their application in *BSCH/Champalimaud* and *Secil/Holderbank/CIMPOR* cases in spite of the Commission's clear-cut position on the matter. The obstructionist nature of DL No.380/1993 also stems from Portugal's challenge to the Commission's decision on *CIMPOR* deal when the government resisted compliance and sought to defend GSs by challenging the Commission's authority to decide on the matter.⁴⁹⁰ The aforementioned point is particularly revealing of inherent obstructionist nature of DL No.380/1993, since the government's challenge to the decision came at the time when the legal basis for the Commission's condemning decision has already been

⁴⁹⁰ Case C-42/01 *Portugal*, note 484.

referred to the CJEU under Article 258 TFEU. Portugal's conduct is even more disturbing in light of political commitment not to employ GSs to EU investors. Such obstructionist protectionist behaviour implies that the Commission's clear-cut policy setting failed to reach the addressee and the Portuguese government could also 'fail seeing the light' and embark on comprehensive policy change following the condemning judgment on case C-367/98.

It should be noted on the prominence of the reply to the Commission's correspondence on the matter: Portugal's reply to the Commission's reasoned opinion arrived with considerable delay. Likewise, the government did not anticipate any amendments to DL No.380/1993 and amendment to discriminatory provisions (DL No.24/1996) has not been ratified either. The government had adequate time for compliance on its own initiative, since between its reply to the reasoned opinion of 7 September 1995 and the Commission's decision to refer the matter to the Court on 11 December 1997 more than two years have passed. It should be noted that another ten months have passed between the Commission's decision to refer the matter to CJEU and the actual lodging of application on 14 October 1998. The unsuccessful compliance measure DL No.24/1996 demonstrates that the government could have efficiently and promptly complied, yet it avoided doing so prior to the judgment. In spite of the foresaid inclination to resist compliance pre-judgment and the inherent obstructionist nature of the measures concerned, the government had an obligation to comply following the judgment. However, as the following section will demonstrate, it has failed to do so.

8.1.D: Assessing Compliance

At the time of the judgment Portugal was experiencing political instability (Royo 2013). Privatisation of the key strategic companies was in full swing, with most prized enterprises entering competitive markets. By the beginning of the 2000's the pressure for reforming national policies has vanished: 'Maastricht test' has been passed and the country has been accepted into the Eurozone, which inevitably led to lessening of enthusiasm for EU-induced reforms and overall EU integration (ibid). The government has entered 'a phase of clear divergence' (Goucha, Soares 2010: 319) with the EU, resorting to obstructionist protectionist measures, implementing numerous GSs for privatised companies. As the *BSCH/Champalimaud* and *Secil/Holderbank/CIMPOR* cases have demonstrated the

Portuguese government was ready to defend its protectionist stance, revolving back to traditional protectionist and interventionist approach. Naturally, this was an unpropitious time for compliance with the judgment on protectionist GSs.

Almost a year after the judgment on case C-367/98 the government has not communicated any compliance measures to the Commission. The provisions of Article 13(3) LQP and other measures which limited foreign participation stayed in force following the condemning judgement. The matter remained unsolved for the months to come as the government resorted to unnecessary delays and non-compliance.

On 15 May 2003 the Commission had decided to initiate new infringement proceedings under what is now Article 260 TFEU (European Commission IP/03/692). Penalty threats have prompted the government to re-assess its compliance commitments. On 4 November 2003 the Prime Minister José Manuel Barroso approved Law No.102/2003⁴⁹¹ which entered into force on 15 November 2003. This compliance measure was implemented more than fourteen months following the judgment on case C-367/98 and exactly six months following the Commission's initiation of infringement procedure for non-compliance. Provisions of Law No.102/2003 signify the unambiguous nature of compliance obligation imposed on the government by the Court's judgment. The compliance measure represented a half-page long document with no preamble and only three provisions, repealing the following: Article 13(3) LQP, DL No.24/1994 and all discriminatory company-specific decrees implemented pursuant to Article 13(3) LQP. Yet the Law No.62/2003 addressed only part of the judgment, merely repealing the discriminatory measures which, as the above analysis revealed, initially lacked an obstructionist nature and had the potential for being removed in good faith back in 1996. Controversial provisions of non-discriminatory DL No.380/1993 remained intact – their exquisite obstructionist nature proved to be the case.

Non-compliance with the judgment stretched for another three months before the Commission decided to proceed with the second stage of the infringement procedure under Article 260 TFEU by issuing a reasoned opinion on 21 January 2004. Portugal had two months to comply otherwise the matter would be brought to the CJEU and penalties applied. Prompted by the imminence of penalties Portugal

⁴⁹¹ Law No.102/2003 of 15/11/2003, (*DoR I*, Seria-A, No.265).

has finally complied on 4 February 2004 by approving DL No.49/2004.⁴⁹² This compliance measure consisted of a repealing article and a short preamble. The preamble paid a tribute to the law it is repealing, re-emphasising the important role played by the DL No.380/1993 and stressing that the approval system has been a milestone for achieving objectives behind re-privatisation and its successes could be deemed as positive overall. Further the government went on to stress on the importance of maintaining state control over newly privatised SOEs post-privatisation concluding that objectives behind DL No.380/1993 have been already met and its further existence is not justified so the provision must be repealed.

The wording of DL No.49/2004 imitates a good-natured manner of compliance which, as the government suggests in the pre-amble, came as a result of successful application of DL No.380/1993 to its fullest potential. There is no mention of infringement proceedings whatsoever, neither of case C-367/98 nor of the infringement procedure for non-compliance, so the wording of the DL No.49/2004 imply compliance by the state's own initiative, which was not the case. Firstly, the timing of implementation of both compliance measures of Law No.62/2003 and DL No.49/2004 signifies that the Portuguese government complied only once the second referral and the associated penalty threat has been likely in the foreseeable future, escalating infringement to the limit that could no longer be ignored. Secondly, the wording of the two compliance measures also signifies that compliance obligation was not of an ambiguous nature: discriminatory provisions of Article 13(3) LQP and DL No.24/1994 had to be repealed, since their application could not be justified. The non-compliance with the condemning judgment in case C-367/98 stretched for almost one and a half years which confirms that the government has acted in bad faith and contrary to loyalty principle when addressing obligations imposed on it by the GS judgment.

One of the reasons behind the foresaid compliance and removal of DL No.380/1993 could be the fact that the protectionist/deterrent nature of this GS measure could be effectively substituted by another effective GS provision of Article 15 LQP. The case C-367/98 has not challenged the legality of Article 15 LQP, leaving Portugal free to employ GSs which will become subject to the judgments analysed in the following three sub-paragraphs. It is pertinent to emphasise that

⁴⁹² Decree-Law No.49/2004 of 10/03/2004, Repealing Decree-Law No.380/93 of 15/11/1993, (*DoR I*, *Seria-A*, No.59).

availability of this alternative protectionist mechanism prompted the final compliance ‘by repeal’ with the present case, so the government has ultimately complied without any further procrastinations or amendments to overruled DL No.380/1993.

To conclude, when all of the above circumstances on compliance are taken into account the ultimate compliance measure with judgment on case C-367/98 is seen as compliance in bad faith. Firstly, the initial compliance failed to effectively remedy the breach confirmed by the CJEU. Even though some of the most controversial provisions have been repealed, the government chose to retain a non-discriminatory provision, retaining protectionist powers of the GSs as a result. In this respect it could be concluded, that despite the compliance ‘by repeal’ the initial compliance measures were insufficient. Secondly, even though the ultimate compliance measures completely remedied the breach, the government failed to embark on the wider policy change by retaining other GSs (Article 15 LQP) in its arsenal of protectionist measures. Such conduct supports the hypothesis on effectiveness of minimalist compliance (H1a) also confirming hypothesis on effectiveness of the agenda-setting case-law (H3). In a similar vein, as compliance has been finally achieved only at the advanced stage of the second infringement procedure under Article 260 TFEU the core enforcement effectiveness hypothesis (H1) and the second enforcement effectiveness hypothesis (H2) are confirmed.

8.2. Legislator-State v Shareholder-State: ‘Classic’ Golden Shares

This sub-chapter analyses Portugal’s compliance with case C-171/08⁴⁹³ – one of the latest contributions of the CJEU to the body of GS case-law. In this case GSs were implemented into the corporate statutes of *Portugal Telecom (PT)* pursuant to Article 15(3) LQP and the relevant privatisation decree-law. Section 8.2.A reflects on the GSs while Section 8.2.B reveals Portugal’s conduct during infringement procedure and application of GSs. The latter section will support the theory that, once implemented, GSs are likely to be used to block potential cross-border takeovers. Section 8.2.C assesses arguments of the parties at the judicial stage of the procedure and Portugal’s defence strategy, in order to further support the obstructionist nature of GSs. Section 8.2.D reflects on inclination to comply with the judgment and concludes that Portugal has resorted to procrastination and obstructionist non-compliance, thus acting in bad faith. This section also reflects on obstructionist nature of the GSs implemented pursuant to the LQP, which would become subject to subsequent judgments on GSs held in energy companies analysed in sub-chapter 8.3 of this study. Section 8.2.E first reflects on application of GSs prior to the CJEU’s judgment on GS case, then concluding with overall Portugal’s conduct at the time of penalty procedure for non-compliance with the said judgment. Following the analysis of compliance conduct in it will be concluded that Portugal is prone to obstructionist behaviour and non-compliance post-judgment.

8.2.A: Through the ‘back door’ - Law No.11/90

In the previous case C-367/98 the CJEU has not challenged *acções privilegiadas* of Article 15 LQP, while the major legislative reform of 1999⁴⁹⁴ left them enact by stating that they are ‘expressly legitimate and desired mechanism that should be applied in the future’.⁴⁹⁵ It is necessary to recall the substance of Article 15(3) LQP, which allowed the creation of a classic GSs - the corporate statutes of privatised companies may ‘in exceptional cases, where grounds of national interest so require’ incorporate non-transferrable shares exclusively reserved for the state with special rights attached to them. Special rights applied irrespective of the actual amount of shares held, be it five single shares or five million shares. The enabling

⁴⁹³ Case C-171/08 *Commission v Portugal* [2010], ECR I-0000.

⁴⁹⁴ Decree-Law No.558/99 of 17/12/1999, (*DoR I*, Seria-A, No.292, p.9012-9019).

⁴⁹⁵ *Ibid*, p.9013.

provision of Article 15(3) LQP did not infringe the Treaty *per se*, as it has merely allowed for further implementation of company-specific privatisation decree-laws, which in turn could enable the government to incorporate *acções privilegiadas*.

Effectively, the government had discretion on whether to include GS provision in decree-laws and then factually create them via corporate statutes. Since, pursuant to the LQP each stage of privatisation must be governed by decree-law, every time the government disposed of shares it could amend or withdraw the existing GS provision. Subsequently, further decree-laws could have incorporated further justifications for GSs extending beyond the vague justification contained in the enabling Article 15(3) LQP. Also, at least in theory, further justifications could also be incorporated into corporate statutes of the relevant company by establishing clear and precise objectives for application of special rights. What has been said above is just a hypothetical possibility, which, as the *Volkswagen* case has demonstrated, has significant implications regarding the extent to which shareholders could freely impose special rights (such as directors' appointments) on the shareholder-state via the company's statutes.

As the cases on *BSCH/Champalimaud* and *Secil/Holderbank/CIMPOR* have demonstrated, Portugal has been aware of the alleged illegality of GS provisions of the LQP, but chose to continue with practice of blocking undesirable cross-border capital movements. Consequently, the government employed GSs in companies such as *PT* in spite of early calls for abandoning such protectionist measures. Such disregard of EU law and persistence with the Treaty infringement has been met with criticism by the press (Financial Times (20/07/2000, 20/07/2000a). Before privatisation the government consolidated and considerably enlarged *PT*, making it the largest listed company in Portugal and *de facto* telecommunications monopoly, ready for international expansion and privatisation. *PT*'s privatisation commenced in 1995 with first disposal of state shareholdings governed by company-specific DL No.44/1995,⁴⁹⁶ which from the onset confirmed that privatisation is a 'valuable opportunity to affirm the presence of the country and its companies in international capital markets'.⁴⁹⁷ Basically, the Portuguese government expressed its view that privatisation is a means to establish its national champion *PT* as competitive international player and GSs aimed at facilitating this ambitious objective.

⁴⁹⁶ Decree-Law No.44/95 (*DoR I*, Seria-A, No.45/95).

⁴⁹⁷ *Ibid*, p.1067.

According to DL No.44/1995 no entity could acquire more than 10% of the company's share capital and *PT*'s statutes could introduce special *A-shares* with special rights attached and the majority of these shares must be held by the state's authorities.⁴⁹⁸ At a time when the government was still a majority shareholder it adopted *PT*'s statutes, creating 47.5 million A-shares.⁴⁹⁹ Between 1997 and 1999 Portugal further disposed of its stakes in *PT* and the amount of A-shares has been gradually reduced. Beginning from 1997, Portugal was no longer major shareholder and *PT* could have been taken over if it was not for GSs in *PT*'s corporate statutes which granted the state with numerous special rights such as: to appoint one third of the directors' board and a chairman, to appoint a minimum of one member of the executive committee, to authorise company's resolutions, amendments to company's statutes or introduction of any limits on special rights.

PT's corporate statutes also established approval regime granting A-shareholder with special right to authorise acquisitions in excess of 10% of voting share capital by entities engaged in competing activities (European Commission IP/05/1594). The approval also applied for decisions approving general objectives and fundamental principles of *PT*'s policies in respect of acquisition and disposal of shareholdings in companies, in cases when the AGM's prior authorisation is required.⁵⁰⁰ By means of *PT*'s statutes the Portuguese government effectively allowed itself to have the final say in strategic decisions allowing *de facto* control over the company.

In September 2000 the government disposed of all shares held in *PT*, retaining only 500 A-shares (European Commission IP/05/1594). By that time GSs implemented pursuant to Article 15(3) LQP have already attracted attention of the Commission as revealed by *Secil/Holderbank/CIMPOR* case. Back then the Commission had acknowledged that GSs were implemented in *CIMPOR* corporate statutes.⁵⁰¹ The issue of GSs once again re-appeared in 2004 during Portugal's challenge of the Commission's decision on *Secil/Holderbank/CIMPOR* case.⁵⁰² This reveals that the Commission had long been aware of GSs' existence in Portuguese

⁴⁹⁸ *Ibid*, Article 11&20.

⁴⁹⁹ Advocate General (2009), Opinion by the AG Mengozzi of 2/12/2009 on Case C-171/08 *Commission v Portugal*.

⁵⁰⁰ Advocate General (2009), *op. cit.*, para.6.

⁵⁰¹ Case No.COMP/M.2054, *supra* note 459, paras.8&18.

⁵⁰² Advocate General (2004), *supra* note 484, para.6.

companies and of their dissuasive effect. Now it was time for the Commission to intervene and force Portugal to withdraw *acções privilegiadas* of Article 15 LQP.

8.2.B: Hostile Takeover and Referral

Even though the Commission had long been aware of GSs' existence in corporate statutes of Portuguese companies, the infringement procedure on GSs held in *PT* was initiated years later on 19 December 2005 (European Commission IP/05/1594). Portugal has duly replied to the formal letter, but the Commission issued a reasoned opinion on 10 April 2006, allocating two months for compliance.⁵⁰³ Past the deadline, on 24 July 2006, Portugal denied the infringement and argued that GSs granted rights which have a private-law character, are non-discriminatory and justified by the reasons of general interest (European Commission IP/08/120). Following considerable period of deliberation, the Commission decided to refer the matter to CJEU on 31 January 2008 (ibid). The Commission had been aware of GSs for several years, yet it decided not to initiate infringement proceedings until 2005. It could be argued that similarly as in other GS cases, the Commission's infringement action has been prompted by foreign investors' interest to take over *PT*.

In January 2006 national rival *Sonaecom* partly owned by a French company, launched a hostile takeover of *PT* (Financial Times 8/02/2006). *Sonaecom* indicated that following the takeover it would dispose of *PT*'s biggest asset – Brazilian company *Vivo* (European Commission IP/08/120). Similarly as it was the case in *Secil/Holderbank/CIMPOR*, *Sonaecom* required the withdrawal of GSs.⁵⁰⁴ Such takeover and its consequences were a very politically sensitive issue, since disposal of *Vivo* would have undermined *PT*'s dominant position in the Brazilian market. Therefore it is unsurprising that many commentators suggested that the government could veto the deal (Financial Times 3/03/2006). The *Sonaecom* bid reveals that the Commission could particularly attack GSs when they are likely to thwart hostile takeovers. *Sonaecom*'s concerns with *PT*'s GSs could have been brought to the attention of the Commission pre-bid, which could have prompted it to intervene. In this respect, *PT*'s case is very similar to *Porsche*'s takeover ambitions for *Volkswagen*, when the takeover ambitions acted as catalyst for the Commission's pro-active intervention. In case of *Sonaecom*'s takeover there was no veto from the

⁵⁰³ European Commission (IP/06/440).

⁵⁰⁴ *Ibid.*

government since *PT*'s shareholders rejected the bid, so there was no need for the state to intervene and employ its veto. *PT*'s shareholders once again rejected *Sonaecom*'s revised bid in 2007. If the shareholders would have voted in favour of any of the two takeover bids, the government would have most likely imposed veto to block the deal.⁵⁰⁵ This assumption will be later supported by the government's actions during the post-judgment stage - when it has vetoed shareholders' decision to accept another hostile takeover bid involving *Vivo*.

In line with the enforcement effectiveness hypothesis, Portugal's resistance to remove GSs in light of both *Sonaecom*'s request and the infringement proceedings reveals their potential obstinacy which could result in non-compliance post-judgment. The main effectiveness hypothesis (H1) could further be supported by the fact that on 29 March 2006, following the first *Sonaecom* bid, the Ministry for Finance has implemented additional safeguards by updating the Code of Commercial Companies.⁵⁰⁶ The new provision concerned shareholdings subject to privatisation and offered the shareholder-state a supplementary control mechanism, providing that any shares subject to privatisation must always constitute a special category of shares and voting rights attached to such shares could not be limited by company's statutes. For the purpose of present analysis it should be noted that by this new provision the government has limited the right of shareholders to impose voting limitations on privatised shares that are otherwise permitted under Article 384(2) of the Code of Commercial Companies. This additional limitation of shareholder's rights reveals Portugal's determination to retain special rights and the following Section 8.2.C will analyse the government's conduct at the judicial stage of the infringement procedure, revealing that there was no inclination to comply before the judgment on case C-171/08.

8.2.C: Infringement Proceedings

During the judicial proceedings Portugal argued that the action is inadmissible since the Commission failed to annex the texts of *PT*'s statutes in its application, therefore failing to provide the CJEU with proof of infringement and founding the action 'on mere presumptions'.⁵⁰⁷ As *Secil/Holderbank/CIMPOR* case has

⁵⁰⁵ Commission Decision of 23/01/2013 on Case AT.39839 – *Telefónica/Portugal Telecom*, Antitrust Procedure under Council Regulation (EC) 1/2003 Article 7 Regulation (EC) 1/2003, Brussels, C(2013)306 final, p.69-70.

⁵⁰⁶ Article 60 of Decree-Law No.76-A/2006 of 29/03/2006 (*DoR I*, Series-A, No.63).

⁵⁰⁷ Case C-171/08 *Commission v Portugal*, note 493, paras.14-15.

demonstrated, the government has long been aware of the Commission's view on illegality of GSs enacted in national companies' statutes, yet it pleaded that the failure to merely present the CJEU with *PT*'s statutes could make the action inadmissible. To this extent the CJEU stressed that Portugal has never denied the existence of GSs and repeatedly confirmed that it owns 500 A-shares in *PT* with special rights attached.⁵⁰⁸ Since the government has confirmed that it holds GSs such plea of inadmissibility appears to be ill-fated – its invocation points towards desire to protect GSs by any means possible. The second plea of inadmissibility also supports this claim, since Portugal merely questioned the completeness of the Commission's complaint.⁵⁰⁹ Both pleas signify that the Portuguese government insisted on legality of its GSs and was inclined to resort to obstructionist behaviour and no compliance could have been envisaged prior to the judgment.

During judicial proceedings, Portugal also argued that *PT*'s A-shares are not a state measure but preferred shares which are a result of private agreement expressing the will of shareholders and is in line with normal application of national company law.⁵¹⁰ The claim that GSs are expression of *PT* shareholders' will could not have legitimate standing, since the legislator-state first allowed for implementation of such protectionist measures into company's statutes pursuant to DL No.44/1995, and then shareholder-state incorporated these measures into the said statutes. It appears obvious that GSs are in fact a state measure which is not attributable to the will of *PT*'s ordinary shareholders, especially considering that the state since has withdrawn its ownership by merely retaining 500 A-shares which effectively allowed it to veto any amendments to the corporate statutes. Therefore the Commission rightfully maintained that GSs are a state measure implemented pursuant to the LQP and DL No.44/1995 at a time when the government was a majority shareholder and since GSs are non-transferable they are also contrary to the general provisions of national company law.⁵¹¹

Portugal maintained that even if GSs were a state measure they are not intended to impede free movement of capital, since these measures concerned managerial decisions and not disposals/acquisitions of company's shareholdings.⁵¹² The Commission maintained that GSs restrict free movement of capital and

⁵⁰⁸ Case C-171/08 *Commission v Portugal*, note 493, para.21.

⁵⁰⁹ *Ibid*, paras.25-30.

⁵¹⁰ *Ibid*, para.41.

⁵¹¹ *Ibid*493, para.32.

⁵¹² *Ibid*, para.43.

establishment since they create a system of approval allowing the government to veto a number of strategic decisions of the company, hindering shareholders' right to participate in management and control of the company and impede acquisition of the controlling shareholdings.⁵¹³ Portugal has also claimed that the mere fact that it holds GSs does not make investment in *PT* less attractive, since the government has never exercised its right to veto.⁵¹⁴ The Portuguese government insisted that even if GSs restrict free movement rights they are justified on grounds of public security and public policy (ensuring availability of telecom services in case of crisis or war) as well as by the need to prevent disruptions on the capital market and ensure competition.⁵¹⁵ The latter two justifications on economic grounds corresponds to the one applied in the first Portuguese case C-367/98 and as that case has demonstrated such justification could not have a legitimate standing. In respect of the invoked justification on grounds of public policy and security the Commission maintained that Portugal has failed to prove the existence of 'genuine and sufficiently serious threat to a fundamental interest of society' capable of justifying GSs held in *PT*.⁵¹⁶ The Portuguese government also maintained that GSs are proportionate to the objectives attained and are limited to particular situations.⁵¹⁷ The Commission contended this allegation stating that GSs are neither proportional nor legally certain leaving a wide margin for the state's discretion.⁵¹⁸

The CJEU ruled that even if GSs in *PT* were of private character, the shareholder-state is required to comply with provisions of the Treaty.⁵¹⁹ Regarding Portugal's claim that it has never exercised its veto, Advocate General Mengozzi maintained that this claim is irrelevant, and that whether special rights were used or not – the mere presence of approval regime effectively 'discourages' intra-EU investors from directly participating in the capital of *PT* since they would not be able to assume control over the company.⁵²⁰ The Court ruled that Portugal failed to demonstrate how GSs in *PT* could ensure availability of telecom services in case of crisis or war,⁵²¹ also dismissing GSs' justifications on economic grounds.⁵²² The

⁵¹³ Case C-171/08 *Commission v Portugal*, note 493, paras.33-35.

⁵¹⁴ Advocate General (2009), *supra* note 499499, para.45.

⁵¹⁵ *Ibid*, paras.44-46.

⁵¹⁶ *Ibid*, para.37.

⁵¹⁷ *Ibid*, para.47.

⁵¹⁸ *Ibid*, para.40.

⁵¹⁹ *Ibid*, para.64.

⁵²⁰ *Ibid*, para.68.

⁵²¹ Case C-171/08 *Portugal*, note 493, paras.73-74.

CJEU established that in spite of Portugal's claims that GSs in *PT* are limited to particular situations, GSs could not pass the test of legal certainty and proportionality since they are not subject to any conditions apart from the vague provision of Article 15(3) LQP which states that GSs shall be created when 'grounds of national interest so require'.⁵²³ On 8 July 2010, the CJEU declared that Portugal has violated free movement of capital and establishment by maintaining special rights in *PT* allocated in connection with GSs.

From the onset it is apparent that during the judicial proceedings Portugal argued at cross points with the Commission insisting on legality and proportionality of GSs. Portugal has contested the Commission's illegality claims on all points and has not indicated any good faith intentions to amend/repeal or anyhow limit GSs. Such behaviour reveals signs of inherent obstructionist nature of the Portugal's position which could result in minimalist compliance or implementation of inadequate compliance measures and procrastination post-judgment. Following the judgment GSs in *PT* had to be relinquished as soon as possible and the following section shall analyse potential compliance implications which stem from the judgment.

8.2.D: Compliance Obligation

The result of judicial proceedings could be seen as unsurprising, due to legal uncertainty of Portuguese measures and apparent lack of justifications. However the judgment itself possesses several weaknesses, which would most certainly result in further compliance implications and removal of Portuguese GSs. Firstly, the vagueness stems from the fact that provision of Article 15 LQP does not infringe the treaty itself, but rather enables further implementation of GSs via company-specific decree-laws. In the present case DL No.44/1995 also did not contain any specific provision regarding the contents of GSs, it merely established that company's statutes may introduce them. It is pertinent to note here that the introduction of A-shares was a voluntary option reserved for the company's shareholders. From the CJEU's earlier GS jurisprudence it is apparent that there were similar structures in Italian, Spanish and French cases⁵²⁴ where the laws merely facilitated for further implementation of GSs. As the compliance analysis in aforementioned cases

⁵²² Case C-171/08 *Portugal*, note 493, paras.70-71.

⁵²³ *Ibid*, paras.75-77.

⁵²⁴ Case C-58/99 *Italy*, note 24, and Case C-326/07 *Italy*, note 27; Case C-463/00 *Spain*, note 19; Case C-483/99 *France*, note 52.

demonstrated, if the ‘enabling’ national laws do not infringe the Treaty they tend to retain a high degree of potential obstructionist nature post-judgment and are most likely to be amended, not repealed. Specifically, since the present case appears to fall within the ambit of such obstructionist GS cases, a higher tendency to resort to non-compliance post-judgment could be predicted.

Secondly, another weakness of the judgment on case C-171/08 stems from the fact that restrictive ownership ceiling of Article 11 DL No.44/1995, which limited participation in *PT*’s ownership to 10% of the company’s share capital, was not challenged by the CJEU. This signifies that the government has not been obliged by the ruling to repeal or amend the said measure. Thirdly, according to the ruling the breach of the Treaty freedoms lays solely with the special rights reserved for the shareholder-state as provided in *PT*’s statutes. This fact signifies that the government could circumvent to dispose of A-shares and only remove special rights, which would suffice for full compliance. Above all, as the case of *Volkswagen* has duly demonstrated, some of the special rights contained in *PT*’s statutes could have been maintained if AGM of the company’s shareholders would vote in favour of their retention (such as the right to appoint a director).

The above three inherent weaknesses of the judgment have left Portugal with a wide discretion on how to address the ruling on case C-171/08. At this point it is possible to conclude that in line with the core enforcement effectiveness/obstructionist hypothesis of this study and in line with the earlier findings on compliance in Italian and Spanish cases, following the judgment Portugal would most certainly strive for amendments to *PT*’s GSs in attempt to retain special rights. It is necessary to emphasise that enabling Article 15 LQP would not be repealed as a result of condemning judgment on case C-171/08. However there was another implication which emerged a mere seven days prior to the condemning ruling, when the government used its soon-to be overruled GSs to veto *PT*’s shareholders decision to accept cross-border takeover deal that involved *Vivo*.⁵²⁵ The following concluding section will reflect on Portugal’s conduct in light of the imposition of veto and subsequent resistance to compliance which resulted in infringement procedure under Article 260 TFEU.

⁵²⁵ See European Commission Decision (23/01/2013) Case AT.39839–*Telefónica/Portugal Telecom*, C(2013) 306 final; *Financial Times* (2/07/2010).

8.2.E: Golden Shares in Action and Compliance

In spite of the Portugal's claim that the veto was never applied, on 1 July 2010 the government used its soon-to-be condemned special right to veto *PT*'s decision to accept a bid by *Telefónica* of Spain to acquire *PT*'s stake in *Vivo* – a prized asset jointly owned with *Telefónica*.⁵²⁶ Similarly as was the case with two unsuccessful *Sonaecom* bids, *PT*'s shareholders have initially rejected two *Telefónica*'s offers, yet accepted the third one with 74% of shareholders' votes.⁵²⁷ This is when the government used its GSs (Financial Times 1/07/2010). Non-evocation of the veto for *Sonaecom*'s takeover bid assumed inherent obstructionist nature of GSs while imposition of veto on *Telefónica*'s offer confirmed their explicitly protectionist nature. Prior to the imposition of the veto *PT*'s management explicitly pleaded with the government to withhold from using its GS, yet the government maintained that it is 'not going against the will of [*PT*'s] shareholders, but these shareholders should not go against the state will' and that the state was 'thinking of the strategic interests of *PT* and [the] country [when employing the veto]'.⁵²⁸ Here it is important to emphasise that Portugal's veto to overrule shareholder's decision on disposal of an asset located outside of the EU (in Brazil) was unprecedented in the current body of GS case-law.

Despite the condemning judgment issued days following the veto the government made public statements defending its protectionist move and maintaining that it will not withdraw the veto, while also suggesting that it would veto any takeover of *PT* by *Telefónica*.⁵²⁹ It is pertinent to reveal that the Portuguese government stated that CJEU's judgment 'does not diminish in any manner the determination [of the Portuguese government] in safeguarding national strategic interests and the interests of *PT*'.⁵³⁰ Such explicit disregard of EU's stance over *PT*'s GSs signifies Portugal's overall resistance towards compliance. It is necessary to emphasise that in line with the good faith compliance hypothesis, application or use of soon-to-be condemned GSs could be seen as acting contrary to the sincere cooperation obligation, particularly taken the government's claim on non-evocation of veto right.

⁵²⁶ C(2013) 306 final, *op. cit.*, paras.33-35.

⁵²⁷ *Ibid*, para.47.

⁵²⁸ *Ibid*, citing Portugal's Prime Minister José Sócrates.

⁵²⁹ *Ibid*, para.66&73.

⁵³⁰ *Ibid*.

Non-compliance with EU law could be seen as ever more absolute taken that the veto applied not for the protection of its national champion from a hostile cross-border takeover, but for opposition of the champion's asset disposal. It is sufficient to note that the veto goes in sharp contrast with Portugal's claims at the infringement proceedings, when it claimed that *PT*'s GSs concerned solely managerial decisions and not disposals/acquisitions of assets. However, as *Vivo* deal clearly demonstrates, the government could veto managerial decisions *on* asset disposals, effectively restricting cross-border capital movement. In any event, here it must be emphasised that it would be increasingly difficult to justify the veto on disposals of assets held outside the Portuguese territory on grounds of public security and the necessity to ensure availability of telecom services in Portugal.

Going back to the compliance obligation stemming from the judgment, it suffices to note here that after the ruling the president of European Commission José Manuel Barroso (Portugal's former Prime Minister) rather optimistically foresaw that the government will fully comply as soon as possible (Financial Times 9/07/2010). In spite of Barroso's positive view, the government's explicit determination to maintain imposed veto as well as its resolve to retain other GSs implemented pursuant to Article 15(3) LQP signalled that Portugal was unlikely to comply following the judgment of 8 July 2010.

The veto of *Vivo* deal prompted the Commission to employ a proactive follow-up control on compliance. By the end of July 2010 the Commission issued a formal letter requesting for particulars on any compliance measures undertaken or envisaged (European Commission IP/10/1560). Portugal replied in early September reiterating earlier statements that it was considering best possible compliance strategies (*ibid*). However, as the weeks went by there was no compliance and no further information regarding possible compliance measures (*ibid*). The Commission issued a reasoned opinion under the penalty procedure on 25 November 2010, allocating two months for compliance.⁵³¹ Such rapid invocation of compliance mechanism under Article 260 TFEU signifies that the Commission was determined to press Portugal to comply. It could be concluded that in spite of the generally slow follow-up control of post-judgment compliance behaviour any pending cross-border deal blocked by application of GSs promotes the Commission to engage in proactive compliance procedures post-judgment. This finding confirms that pending cross-

⁵³¹ COM(2011) 588 final, *supra* note 36, p.57.

border deal could be one of the factors that promote/influence compliance on GS cases.

Following the expiry of the two month period, the government resisted to comply, resorting to obstructionist non-compliance. Pursuant to general compliance theory, penalty procedures significantly increase a potential for compliance, however as the present case clearly demonstrates Portugal has not envisaged any compliance initiatives even under the threat of penalties. At this point it should be recalled that the obstructionist nature of GSs could be traced back to the initial stages of the infringement procedure when the government decided to implement additional protectionist measures following *Sonaecom*'s bid in 2006. The threads of potential non-compliance with the judgment could be traced back to the judicial proceedings, when Portugal already resorted to non-compliance arguing at cross points with the Commission and withholding from indicating any compliance inclination. In a similar obstructionist manner, Portugal blatantly invoked GSs days before the judgment and there were no compliance-induced activities post-judgment even in light of imminent action under Article 260 TFEU.

The whole issue surrounding the case C-171/08 received much publicity, however taken the overall increasing discontent with EU integration in light of the EU financial crisis, it may have caused that the general public and other actors abstained from compliance-induced shaming from below. It is evident that similarly as in recent Italian and Spanish GS cases⁵³² compliance with the judgment on *PT*'s GSs was not on the forefront of Portugal's agenda - as it was going through severe economic, financial and political crisis (e.g. Magalhães 2012: 324). In this difficult atmosphere the Commission had been cautious not to push struggling governments and postponed referrals for non-compliance with GS cases. At the time of the Commission's enforcement action for non-compliance with ruling on case C-171/08, other cases on *ações privilegiadas* implemented pursuant to Article 15(3) LQP were pending before the CJEU. The following sub-chapter analyses simultaneous compliance with the present judgment on case C-171/08 and the two subsequent judgments delivered in 2010 and 2011.⁵³³ However at this stage it could be concluded that in case of compliance with judgment on case C-171/08 the Portuguese government acted in bad faith towards sincere cooperation obligation

⁵³² Case C-207/07 *Spain*, note 46; Case C-326/07 *Italy*, note 27.

⁵³³ Case C-543/08 *Commission v Portugal* [2010] ECR I-0000; Case C-212/09 *Commission v Portugal* [2011] ECR I-0000.

under Article 4(3) TEU and compliance obligation under Article 260(1) TFEU. As a result, the government's compliance conduct reveals significant shift to obstructionist non-compliance in bad faith, supporting the working enforcement effectiveness/obstructionist hypotheses (H1, H2 and H3) of this study. The following analysis of compliance conduct with GSs judgments on cases C-543/08 and C-212/09 would add to the graveness of the Portuguese conduct and disrespect of the EU law.

8.3. Classic Golden Shares for Energy Champions

The previous sub-chapters have revealed the inherent obstructionist nature of the enabling provisions of the LQP – Portugal has been long aware of dissuasive nature of the relevant GS measures. Yet, in spite of the Commission’s on-going challenge to *PT*’s GSs, the government implemented similar GSs for two energy giants *EdP* and *GALP*. The infringement procedure on *PT*’s measures has been in its advanced stage when the Commission began to question legality of GSs in *EdP* and *GALP*. This sub-chapter analyses Portugal’s compliance with judgments on these GSs delivered in 2010 and 2011 respectively.⁵³⁴ Section 8.3.A discloses the substance of GSs. Section 8.3.B analyses Portugal’s conduct during the infringement proceedings concentrating on the government’s defence strategy and revealing any potential for compliance. Section 8.3.C analyses compliance post-judgment also reflecting on implications stemming from the judgments. Section 8.3.D analyses a forced compliance measure which sought to simultaneously comply with three judgments on GSs held in *PT*, *EdP* and *GALP*. In conclusion sub-chapter reflects on Portugal’s overall compliance conduct.

8.3.A: Golden Shares

At the time of the ruling on case C-171/08, cases on GSs held in *EdP* and *GALP* were pending before the CJEU. In both instances the Commission complained about special rights granted to the government by means of decree-laws which re-privatised relevant companies incorporating *acções privilegiadas* into their corporate statutes. Firstly, pursuant to Article 13(1) LQP each stage of re-privatisation of *EdP* and *GALP* was governed by separate decree-law: *EdP/DL*⁵³⁵ and *GALP/DL*.⁵³⁶ Pursuant to Article 13(2) LQP *EdP/DL* of 1997 (governing the first stage of disposal of state-held shareholdings) established a 5% ownership ceiling on share acquisitions at the time of re-privatisation. Secondly, pursuant to Article 15(3) LQP the *EdP/DL* of 2000 (governing the fourth stage of re-privatisation) has created approval regime by maintaining that, for as long as the

⁵³⁴ Cases C-543/08 *Portugal* and C-212/09 *Portugal*, *op. cit.*

⁵³⁵ Decree-Law No.78-A/97 of 7/04/1997 (*DoR I*, Series-A, No.81); Decree-Law No.94-C/98 of 17/04/1998 (*DoR I*, Series-A, No.90), Decree-Law No.141/2000 of 15/07/2000 (*DoR I*, Series-A, No.162); Decree-Law No.218-A/2004 of 25/10/2004 (*DoR I*, Series-A, No.251); Decree-Law No.209-A/2005 of 2/12/2005 (*DoR I*, Series-A, No.231).

⁵³⁶ Decree-Law No.261-A/99 of 7/07/1999 (*DoR I*, Series-A, No.156) (*GALP/DL*).

state is a shareholder, certain strategic resolutions must be approved by the government. The approval regime of *EdP/DL* granted the state authorities with right to veto any corporate restructurings, amendments to company's statutes and withdrawal of the special rights. Thirdly, pursuant to Article 15(1) LQP, *EdP/DL* of 2000 reserved a special right for the government to appoint its own director to the company's board for as long as the state remains a shareholder.

Pursuant to provisions of the LQP, GSs were also incorporated into *EdP*'s statutes distinguishing between class *A* and class *B shares* (held by the government).⁵³⁷ The corporate statutes incorporated a 5% voting rights ceiling providing that no one but class *B* shareholders could vote in excess of 5% of the total number of voting rights.⁵³⁸ Effectively, the Portuguese state ensured the continuous control over the company by means of *EdP/DL* and corporate statutes of *EdP*. It suffices to note that subsequent *EdP/DL* of 2004 and 2005 that governed further stages of company's re-privatisation preserved provisions on GSs unchanged.

The government implemented similar GSs for *GALP* by means of *GALP/DL*, company's statutes and a shareholder's agreement to which the state was party.⁵³⁹ Firstly, pursuant to Article 15(3) LQP, *GALP/DL* endorsed *acções privilegiadas* which established approval regime granting the state with right to veto one third of directors' appointments, amendments of company's statutes and resolutions on conclusion of certain contracts as well as resolutions which could jeopardise Portugal's supply of oil, gas and their derivatives.⁵⁴⁰ Secondly, *GALP*'s statutes incorporated *acções privilegiadas* distinguishing between state-held *A-shares* and *B shares* granting the *A-shareholder* with the right to appoint the Chairman of the Board of Directors and approve resolutions as provided in *GALP/DL*.⁵⁴¹ Thirdly, *GALP*'s statutes maintained that certain resolutions concerning strategic managerial decisions must be approved by the Boards' Chairman.⁵⁴²

In 2006 the government concluded a shareholders' agreement with *GALP* through a state-held banking group *Caixa Geral de Depositos (CGD)* entitling the

⁵³⁷ *EdP* statutes Article 4(4) and 14 (2) and (3), see Case C-543/08 *Portugal*, paras.11&12.

⁵³⁸ Case C-543/08 *Portugal*, note 533533, para.14.

⁵³⁹ Case C-212/09 *Portugal*, note 533, paras.4-13.

⁵⁴⁰ Article 4(1) and Article 4(3) *GALP/DL*, supra note 536.

⁵⁴¹ Case C-212/09 *Portugal*, paras.8-11.

⁵⁴² *Ibid*, para.11.

latter to appoint the said Chairman.⁵⁴³ Basically *GALP*/DL, together with company's statutes and the shareholders' agreement allowed the government to veto directors' appointments and managerial decisions deemed unfavourable. Here it is pertinent to emphasise that according to *GALP*'s statutes *A-shares* could be converted into *B-shares* 'upon a mere request' by the *A-shareholder* and such conversion would have an immediate effect.⁵⁴⁴ To conclude it must be said that GSs' enactment signifies that both *GALP* and *EdP* were, in the words of the LQP, seen as 'exceptional cases' and protection of these companies was enacted since 'national interests so require'.

8.3.B: Infringement Proceedings

The Commission issued a formal letter on 18 October 2006 accusing Portugal for its overly restrictive GSs and requesting for justifications.⁵⁴⁵ Portugal replied two months later insisting on legality of GSs held in *EdP* and *GALP* on grounds of general economic and public interests that entail the security of energy supply (European Commission IP/08/1357, IP/09/278). On 29 June and 29 July 2007 the Commission issued two separate reasoned opinions for *GALP* and *EdP* respectively, setting a two month period for compliance. After the government's reply of 30 October 2007, the Commission deliberated on its further actions and finally decided to refer the matter to the CJEU on 18 September 2008 (*EdP*) and 19 February 2009 (*GALP*). The Commission argued that GSs at issue represent state measures that are legally uncertain and disproportionate to the objectives pursued, deviate from normal operation of national company law and are liable to deter foreign investments restricting free movement of capital and establishment.⁵⁴⁶

In its defence the government applied a strategy similar to that already tested in case C-171/08 on *PT*'s GSs, where it denied the infringement on all fronts. Firstly, it has challenged admissibility of the action, then the nature of the national measures as being of a purely private law origin. Secondly, Portugal claimed that its GSs do not constitute a restriction on the Treaty freedoms and finally if they do represent a restriction they are duly justified. Thirdly, in both cases Portugal claimed that the Commission had relied on new legal arguments, new grounds of complaints and made new claims which were unexposed at the pre-litigation stage. In its

⁵⁴³ Case C-212/09 *Portugal*, note 533, paras.12-13.

⁵⁴⁴ Article 4(2) of *GALP* statutes.

⁵⁴⁵ Case C-543/08 *Portugal*, para.16; Case C-212/09 *Portugal*, para.17.

⁵⁴⁶ See respective paragraphs of the judgements Case C-543/08 *Portugal*, paras.25-30; Case C-212/09 *Portugal*, paras.33-35.

defence, initially in *EdP* case and later in *GALP*, the government entirely denied the Commission's allegations on illegality of the GSs by stating that neither their purpose nor effect aimed at establishment of any obstacles for investors to participate in share capital of energy companies. Portugal has argued that GSs in both companies do not place any conditions which would create any direct and substantial obstacles for domestic or foreign investors on either direct or portfolio investments.

In both instances Portugal contested the concept of 'restrictive measure' and called the Court for its interpretation. Portugal also claimed that the Commission's allegations on deterring effect of special rights are 'purely hypothetical', 'very tenuous' and 'totally uncertain and indirect', and since they are not supported by analysis of the effects of such rights on investors' decisions to invest in relevant companies, the Commission had failed to discharge its obligation in relation to the burden of proof imposed on it by the Treaty.⁵⁴⁷ In this effect, the Portuguese government went on to stress that it is evident from the *GALP*'s shareholder structure that GSs do not have any negative effect on either direct or portfolio investments in company's share capital.⁵⁴⁸ The government has also contended the Commission's claims that GSs in both companies should be examined as restrictions on free movement of capital, insisting that special rights relate solely to managerial decisions and therefore could only affect shareholders that are capable of influencing management of the company so the free movement of capital is not infringed.⁵⁴⁹ Above all, the Portuguese government stressed that even if the measures in question do constitute restrictions, they are justified by overriding reasons in the public interest and necessity to guarantee the country's security of energy supply. In Portugal's view, GSs in *EdP* were proportionate to the objectives pursued since the Commission had not put forward any possible alternatives of less restrictive nature 'which would allow the government to react swiftly and effectively in the event of a genuine and serious threat to the security of supply'.⁵⁵⁰

The CJEU analysed the purpose of GSs provisions contained in both decree-laws and in companies' statutes, concluding that these measures are attributable to the state and are capable of restricting both free movement of capital and

⁵⁴⁷ Case C-543/08 *Portugal*, paras.31&38; Case C-212/09 *Portugal*, para.37.

⁵⁴⁸ Case C-212/09 *Portugal*, para.38.

⁵⁴⁹ Case C-543/08 *Portugal*, para.37; Case C-212/09 *Portugal*, para.36.

⁵⁵⁰ Case C-543/08 *Portugal*, para.81; Case C-212/09 *Portugal*, para.79.

establishment while affecting all investors.⁵⁵¹ The Court established that GSs in *EdP* and *GALP* could not be justified since the security of the energy supply should be regulated by the government through administrative law and not through GSs.⁵⁵² The Court held that, in any event, GSs in two energy companies could not pass the proportionality test, as they are ‘formulated in general and imprecise manner’ and are not subject to ‘any specific and objective condition or circumstance’.⁵⁵³ The CJEU delivered its condemning judgment on 11 November 2010 in *EdP* case C-543/08 and a year later on 10 November 2011 in *GALP* case C-212/09, obliging Portugal to comply. At the outset, the government addressed its obligations stemming from the ruling on case C-543/08 in a similar manner it has pursued its compliance obligations stemming from the judgment on *PT* case C-171/08: the government confirmed that it will comply (Wall Street Journal 11/11/2010).

8.3.C: Assessing Potential Compliance

As a preliminary point it should be emphasised that it is evident that there are significant similarities between GSs held in *PT*, *EdP* and *GALP* as they all have been created pursuant to the enabling provision of Article 15(3) LQP. Similarly as in *PT*, special rights in energy companies were granted via decree-laws and through companies’ statutes adopted at the time when the Portuguese state was still a majority shareholder. The government’s behaviour during infringement procedures on *EdP* and *GALP* cases also resembles the one used in *PT* case. In neither case did the Portuguese government express any inclination to comply at the pre-adjudication stage. This fact allows concluding that the government did not seek to avoid the referral to the CJEU – the finding that could also be supported by the fact that the government has replied with considerable delay to the two reasoned opinions in both *EdP* and *GALP* cases. Even so, the Portuguese government could still undertake some amendments to contested measures during the Commission’s lengthy deliberations on whether to refer the cases to the CJEU. Yet there was neither amendments nor expressed inclination to comply before the referrals.

Portugal’s defensive strategy at the adjudication stage on both *EdP* and *GALP* cases also resembles the one applied in *PT* – the state completely disregarded claims on the measures’ illegality and disproportionality, arguing at cross points with the

⁵⁵¹ Case C-543/08 *Portugal*, paras.39-44; Case C-212/09 *Portugal*, paras.41-45.

⁵⁵² Case C-543/08 *Portugal*, para.75; Case C-212/09 *Portugal*, paras.71-75.

⁵⁵³ Case C-543/08 *Portugal*, para.90; Case C-212/09 *Portugal*, para.88.

Commission. At the adjudication stage, the Portuguese government eagerly defended its GSs. However, the futility of its defence strategy became evident following the hearing of 29 October 2009 on similar measures applied for *PT* and particularly following their condemnation by the European advocate on 2 December 2009. It could be concluded that before the condemning judgment on *PT*'s GSs in case C-171/08, the government had little anticipation that similar GSs held in *EdP* and *GALP* could be justified, while following *PT*'s condemning judgment there could be even less anticipation that the CJEU would justify similar GSs implemented for two energy companies. Even though it was imminent that the measures held in *EdP* and *GALP* will be overruled in a similar manner as *PT*'s GSs, the government did not anticipate any steps towards compliance on its own initiative but instead merely awaited for predictably condemning judgments on the said cases. At this point it could be concluded that in both *EdP* case C-543/08 and *GALP* case C-212/09 the government evaded the possibility to comply pre-judgment, in spite of the fact that similar GSs have already been overruled. The above analysis leads to the conclusion that following the judgments on GSs held in two energy companies the Portuguese government would most likely avoid comprehensive compliance and resort to obstructionist non-compliance.

Before resuming the assessment of factual compliance with *EdP* and *GALP* judgments it is necessary to overview the compliance obligations imposed on Portugal by the said rulings and the compliance measures which would be deemed adequate and in line with the sincere cooperation principle. The CJEU ruled that special rights enjoyed by the Portuguese government in *EdP* and *GALP*, such as those provided by the LQP, the company-specific decrees and companies' statutes and allocated in connection with *acções privilegiadas* held by the state, are contrary to the Treaty. Following the judgments the government had to withdraw from ownership of any *acções privilegiadas*, relinquishing any special rights. An adequate compliance measure would entail the government to repeal relevant provisions of *EdP/DL* and *GALP/DL* which allowed for GSs implementation. Devoid of legislative basis approval regimes would cease while both companies' statutes could then be amended by the shareholders and GSs provisions removed. Following the repeal of the foresaid provisions, the special appointment right reserved for the government via the *GALP*'s Agreement would lose its inherent power since the

implementation of strategic resolutions by the company's board would not require approval by the Board's Chairman.

Ideally full compliance (which could be seen as being in line with the good faith principle), would entail the repeal of enabling provisions of the LQP, so that similar GSs could not be created in the future. This said, following the rulings, the Portuguese government was obliged solely to repeal special regimes by relinquishing special rights in the companies. Here it must be emphasised, however, that the CJEU's judgments have not obliged the government to also remove provisions of the LQP, yet following three condemning rulings on almost tantamount GSs a substantial motive would seem to appear to once and for all repeal Article 13(2), Article 15(1) and (3). The three rulings seemed to send a clear message to the Portuguese government, revealing that any GSs created pursuant to the foresaid provisions of the LQP would be contrary to the Treaty and unlikely to be justified. At this stage it could be predicted that, similarly as was the case with German government's compliance with judgment on *Volkswagen* case, the Portuguese government would not go beyond what is strictly necessary for facilitating compliance with *EdP* and *GALP* judgments and the LQP provisions would remain enact. Such compliance avoidance would signify the obstructionist nature of the Portuguese measures confirming the working hypothesis on obstructionist non-compliance with GS cases (H1).

Compliance with the present judgments had to be initiated as soon as possible in order to be deemed as compliance in good faith. In the present cases there were several flexible paths that the government could have taken in order to promptly comply, such as urgently disposing of residual state ownership in the said companies, converting *acções privilegiadas* back into ordinary shares or implementing significant amendments to the companies' decree-laws. However it is doubtful that the removal of GSs provisions from the company's statutes while retaining the decree-laws intact would qualify as full compliance. What remains clear is that given the earlier condemning ruling on *PT* case C-171/08, the government could have promptly initiated some steps towards compliance with the judgments on *EdP* and *GALP* cases. Such tactics would have revealed the good natured inclination to comply. However, by the end of 2010 the time for adequate compliance with *PT* and *EdP* rulings was running out and penalty sanctions became an imminent threat. The following section reveals how two penalty proceedings for

non-compliance and international bail-out agreement have forced the Portuguese government to implement urgent measures aimed at facilitating simultaneous compliance with the three judgments on GSs held in *PT*, *EdP* and *GALP*.

8.3.D: Obstructionist Non-compliance and Forced Compliance Deal

As revealed in the previous sections, GSs in *PT*, *EdP* and *GALP* were all implemented pursuant to provisions of the LQP and vigorously defended by the government during the infringement proceedings by using similar defence strategies. The similarities do not end here but stretch to post-judgment behaviour, revealing compliance resistance with all the three GS judgments. At the time of the hearing on *GALP* case (held on 19 January 2011), there was no compliance neither with *PT* ruling on case C-171/08 issued on 8 July 2010 nor with *EdP* ruling on case C-543/08 issued on 11 November 2010. Here it suffices to note that these rulings did not preclude Portugal from vigorous defence of *GALP*'s GSs: at the time of the hearing, it once again argued at cross points with the Commission even in spite of the two condemning judgments on the similar GSs. Moreover, regarding the judgment on *PT* case C-171/08 it should be accentuated that the two month compliance period set on 24 November 2010 by the reasoned opinion issued under Article 260 TFEU procedure was overdue shortly following the hearing on *GALP* case.

Similar non-compliance situation established regarding *EdP*'s GSs when the Commission issued a reasoned opinion under Article 260 TFEU four months following the judgment (European Commission IP/11/288). The Portuguese government had to fully comply by 15 May 2011 in order to avoid second referral and associated fines. However there was no compliance with neither *PT* nor *EdP* judgments by the said date which sets both cases as examples of manifest and obstructionist non-compliance. In both cases the government could choose to comply after the set deadlines, yet such postponed compliance would not rule out the possibility of referrals for non-compliance. Even the imminence of penalty threats did not preclude the Portuguese government from procrastination long pass the set deadlines. Portugal's vigorous defence of GSs in *GALP* and absence of compliance initiatives during adjudication stage also sets the scene for obstructionist non-compliance with the subsequent judgment. Undoubtedly, taken the legitimacy and obstructionist nature of the enabling provisions of the LQP, any new

amendments aimed at justifying GSs would have further stretched non-compliance. At this point it is necessary to lay the emphasis on the fact that from the above analysis it could be concluded that obstructionist non-compliance would most likely plague all three Portuguese cases, if it was not for the great necessity to request for financial assistance from the EU in order to salvage the country from deep economic and financial crisis.

At the beginning of 2011 Portugal has been struggling through severe debt crisis (e.g. Financial Times 10/01/2011 and 28/02/2011; Magalhães 2012) Economic crisis has triggered a political crisis, when the Portuguese parliament failed to approve EU-backed austerity measures which led to the government's resignation (Financial Times 24/03/2011; Magalhães 2012). The outgoing caretaker government had no other option but to request financial assistance from international rescue team on 7 April 2011, the so-called *Troika* (EU, ECB and IMF).⁵⁵⁴ The government and *Troika* agreed on 2011–2014 Economic Adjustment Programme (EAP) by signing the Memorandum of Understanding (MoU), which detailed economic policy measures.⁵⁵⁵ The parties agreed to review Portugal's performance on implementation of the said policies on a quarterly basis and supplement any additional measures in subsequent MoUs. The loan instalments were conditional upon Portugal's compliance with MoU provisions, which anticipated privatisation of *GALP* and *EdP* and a complete elimination of GS provisions. Pursuant to MoU the government has undertaken to eliminate GSs by the end of July 2011 as well as any 'special rights established by law or in the statutes of publicly quoted companies that give special rights to the state'.⁵⁵⁶ Following such commitments under the EAP it seemed that there was no more leeway for procrastination and non-compliance with GS judgments. Without financial assistance under the EAP Portugal would have most likely defaulted on its debt, yet it is quite remarkable to see that compliance with the CJEU rulings on GSs became one of the conditions for financial aid – it says a lot about the Commission's trust of Portuguese compliance initiatives. However the inclusion of the provision obliging Portugal to comply with GS judgments could also demonstrate that the Commission acknowledges that its own

⁵⁵⁴ MEMO/11/227, European Commission, Statement by the Eurogroup and ECOFIN Ministers', Brussels, 8/04/2011, this and other Press Releases and Programme Reports on the subject could be accessed at: http://ec.europa.eu/economy_finance/assistance_eu_ms/portugal/index_en.htm.

⁵⁵⁵ MoU (17/05/2011), in European Commission (June 2011) The EAP for Portugal, *European Economy*, Occasional Papers 79, Brussels, pp.114.

⁵⁵⁶ §7.19, MoU (17/05/2011), *op. cit.*

enforcement powers might be not strong enough to guarantee due compliance with and respect to the CJEU's jurisprudence.

On 25 July 2011 the Decree-Law No.90/2011⁵⁵⁷ entered into force, repealing company-specific decree-laws that created GSs in *PT*, *GALP* and *EdP*. In its pre-ambble the government emphasised that elimination of GSs should be viewed in the context of MoU and concluded that notwithstanding the importance and justified application of GSs in *PT*, *EdP* and *GALP* in context of privatisation, these measures should now be repealed. Decree-Law No.90/2011 also repealed supplementary control mechanism of 2006 which was implemented following *Sonaecom*'s bid and which excluded state-held shareholdings from limitations permitted under Code of Commercial Companies. It is suffice to note that in spite of the condemning judgments and obligations under MoU the government chose to re-iterate the importance of role played by GSs during privatisation. This fact reveals that the government continued to perceive GSs as a useful mechanism, meaning that obstructionist non-compliance could persist in the context of future privatisations.

Following implementation of Decree-Law No.90/2011, the government has met obligations under MoU by successfully eliminating decree-laws by the end of July 2011. However it has failed to entirely eliminate special rights, since relevant provisions were still incorporated into companies' statutes. The corporate statutes were amended on 26 July (*PT*), 3 August (*GALP*) and 25 August (*EdP*) 2011. In the view of the adopted provisions and compliance initiatives the Commission has closed the infringement cases on *PT* and *EdP* GSs cases on 27 October 2011. At this point it should be stressed that the government failed to promptly repeal special rights by the end of July 2011 as agreed in the MoU, as the statutes of *GALP* and *EdP* were amended after the estimated compliance deadline which was on July 2011. Additionally, the government continued to own a 1% stake in *GALP* through the state-held *CGD*, which granted it with special rights. In spite of such delayed compliance the Commission praised the Portuguese government for GSs removal.⁵⁵⁸ Yet, as the following findings demonstrate, the Commission's praise has been premature.

⁵⁵⁷ Decree-Law No.90 (*DoR I*, Series-A, No.141).

⁵⁵⁸ European Commission (September 2011) *The EAP for Portugal First review – Summer 2011, European Economy, Occasional Papers 83*, Brussels, pp.115.

Under the updated MoU, the government undertook not to create obstacles to free movement of capital.⁵⁵⁹ The Portuguese government also committed to ensure that the government would avoid concluding shareholder agreements which could hinder free movement of capital or influence the management or control of companies and undertook to withdraw from the existing shareholder agreement in *GALP* by ensuring that *CGD* alienates the remaining 1% stake in the company by the end of 2011.⁵⁶⁰ On 13 September 2011 the government implemented the new LQP, as amended by Law No.50/2011,⁵⁶¹ emphasising that by implementation of this measure Portugal goes beyond its initial commitments under MoU.⁵⁶² The Law No.50/2011 repealed enabling provisions of Article 15(1) and (3) LQP, eliminating legislative basis for implementation of GSs and also eliminating possibility for imposition of voting right ceilings under Article 13(2).⁵⁶³ Following the amendment, pursuant to Article 13(2) LQP acquisition ceilings were permitted and could be applied in a proportionate manner solely in the context of future re-privatisations as determined in further privatisation laws and will not set or allow ownership or acquisition ceilings beyond the privatisation transactions.⁵⁶⁴ These compliance measures reveal significant compliance problems.

Firstly, special rights in *GALP* implemented through a shareholding agreement were not fully eliminated since the government continued to indirectly own a 1% stake. Secondly, the amended Article 13(2) LQP allowed for imposition of ownership and acquisition ceilings for future re-privatisations. Subsequent privatisation of *GALP* and *EdP* would have been governed by these amended provisions of the LQP, so further ownership or acquisition ceilings could be imposed. The government's commitment to dispose of the remaining 1% stake in *GALP* by the end of 2011 could also be seen as 'good intention goes wrong', since the transaction has been continuously re-iterated and subsequently delayed.⁵⁶⁵ In the

⁵⁵⁹ §7.18 MoU (1/09/2011) *First review, op. cit.*, p.99.

⁵⁶⁰ *Ibid*, p.99.

⁵⁶¹ Law No.50/2011 Second amendment to the Law No.11/90 'Framework Law on Privatisations' of 5 April 1990, of 13/09/2011 (*DoR I*, Series-A, No.176).

⁵⁶² §7.18 MoU (1/09/2011) *First review, supra* note 558, p.99.

⁵⁶³ *Ibid*, p.100.

⁵⁶⁴ *Ibid*.

⁵⁶⁵ §3.30, §7.15-§7.16 MoU (9/12/2011) in European Commission (December 2011) *The EAP for Portugal Second review—Autumn 2011*, *European Economy*, Occasional Papers 89, Brussels, pp.149; §7.9-§7.10 MoU (15/03/2012) in European Commission (March 2012) *The EAP for Portugal Third Review—Winter 2011/2012*, Brussels, pp.120; §3.22, MoU (27/06/2012) in European Commission (July 2011) *The EAP for Portugal Fourth review – Spring 2012*, *European Economy*, Occasional Papers 111, Brussels, pp.121; §3.2, §7.8 MoU (27/06/2012) in European Commission (October 2012)

meantime, on 10 November 2011 the CJEU has issued its ruling on *GALP* case. In spite of the condemning ruling, in spite the obligations under MoUs and numerous commitments not to implement obstacles to free movement of capital and to relinquish special rights in *GALP*, the government engaged in further procrastinations, resisting relinquishing its special rights and further delaying compliance.⁵⁶⁶ It is sufficient to conclude that it is evident that the government's good faith commitment under MoUs goes in sharp contrast with its actual compliance conduct.

On 24 May 2012, more than six months following the judgment on *GALP* GS case, there was no compliance and the Commission formally asked Portugal for explanations.⁵⁶⁷ Apart from Portugal's resistance to relinquish remaining GSs the Commission had another significant concern – new DL No.112/2012⁵⁶⁸ implemented pursuant to the amended LQP of 2011. The DL No.112/2012 has created acquisition ceilings limiting anyone but the state and state-controlled companies from acquiring more than 25% of share capital in the energy transmission system operator or of any companies controlling it.⁵⁶⁹ Contrary to Portugal's numerous commitments not to implement obstacles to free movement of capital, the ownership ceiling of DL No.112/2012 clearly represented such an obstacle. In this light Portugal's conduct on compliance with the obligations stemming from the numerous MoUs and the CJEU's judgments is seen as action in exceptionally bad faith.

Likewise, in spite of the condemning judgments and commitments under Economic Adjustment Programme in the recent MoU of April 2014⁵⁷⁰ the following provision remains: 'the [Portuguese] authorities also commit to ensuring that obstacles to free movement of capital will not be created by their action [and] acknowledge that the discretion granted under the amended article 13(2) LQP if used, shall be restricted solely to the concrete privatisation operation and thus used in such a proportionate manner that privatisation's implementing laws will not set or

The EAP for Portugal *Fifth review* – Summer 2012', *European Economy*, Occasional Papers 117, Brussels, pp.106, p.31.

⁵⁶⁶ See European Commission, *Third Review*, *op. cit.*, para.74, p.39 and §7.9-§7.10 MoU (15/03/2012) p.112; European Commission *Fifth review*, *op. cit.*, p.31.

⁵⁶⁷ European Commission *Fourth review*, *op. cit.*, para.88, p.40.

⁵⁶⁸ Decree-Law No.112 of 23/05/2012 (*DoR I*, Series-A, No.100).

⁵⁶⁹ European Commission *Fourth review*, *op. cit.*, para.88.

⁵⁷⁰ European Commission (April 2014) 'The Economic Adjustment Programme for Portugal Eleventh review', *European Economy*, Occasional Papers, 191, Brussels, 140pp, p.103.

allow holding or acquisition caps beyond the privatisation transaction.’ The state of the facts reveal that despite the international bail-out, a number of condemning judgments and penalties procedures which proceeded to advance stages, Portugal foresees implementation of GSs (acquisition ceilings limiting the rights of any entity to acquire shares above certain threshold) for future privatisations by means of provisions of law on privatisation which were implemented in 1990. This fact reveals that the government anticipates using GSs in the future despite all odds. Subsequently the Commission opened a new infringement procedure on an acquisition caps in 2014 (ongoing as of 22 April 2015).

On 27 November 2012 the government has sold the remaining 1% stake held through the state-owned *CGD* in *GALP*, finally eliminating the special rights and complying with the *GALP* judgment after one year of procrastination.⁵⁷¹ The Commission has closed the infringement proceeding concerning non-compliance with judgment on *GALP* GSs on 24 January 2013. In respect to the latest case on GSs held in *GALP* it should also be recalled that in spite of the extreme pressures imposed on Portugal by the commitment under the EAP of 2011-2014, the deadlines set in MoU have not been observed. The above analysis of the compliance chain of events allows the conclusion that when addressing the compliance obligations stemming from the GS judgments on *GALP*, *EdP* and *PT* as well as from the sincere cooperation obligation enclosed in the Treaty, coupled with obligations under the EAP the Portuguese government has resorted to obstructionist non-compliance, disregarding its obligations to comply and remove GSs.

⁵⁷¹ European Commission (December 2012) The Economic Adjustment Programme for Portugal *Sixth Review*—Autumn 2012, *European Economy*, Occasional Papers 124, Brussels, pp.96.

Concluding Analysis and Remarks on Portuguese Golden Share Cases

This chapter has revealed that Portugal has been in consistent defiance of EU law when the matters concerned GS protection enacted for national champions, important for the country's economy. Unwelcome acquirers buying into national businesses were seen as invaders: the government has been especially militant in *BSCH/Champalimaud* case⁵⁷² imposing the veto on the said acquisition within 24 hours following the deal. Companies such as *Holderbank/Secil* have also failed to breach the government's resistance to remove GSs in *CIMPOR* and the bidders' determination for the deal with their two revised applications could not match Portugal's persistence to retain GSs in its 'strategic' cement company. Here it suffice to note that Portugal's national champions such as *CIMPOR*, *PT* or *EdP*, so vital for the state's economy, are in fact 'small fry' when compared with big international companies, and the government's protection over these important enterprises could be justified to some extent (Financial Times 25/10/2000). GS protection could particularly be justified for companies providing services of general public interest, yet when reflecting on the matter of protectionism prior to the judgment on case C-367/98 the government emphasised on economic importance of such companies and this objective could not be justified by application of GS measures. The Portuguese government's commitment to liberalisation, re-privatisation and its support for the EU integration matched its desire to resist compliance and retain GSs, which led to obstructionist non-compliance with the Treaty provisions and the CJEU's judgments.

The LQP of 1990 was one of the earliest GS laws, yet it became the basis for some of the most recent judgments. This reveals obstructionist character of this GS law, which stems from its structure allowing for possible justifications which could have been implemented via decree-laws and companies' statutes. This intricate web of protectionist provisions evolved into obstructionist GS system. All of the justifications attempted by the Portuguese government failed to remedy the breach of the Treaty, triggering further infringement procedures and further stretching non-compliance. In spite of the numerous commitments the Portuguese cases reveal significant resistance of the national authorities to repeal GSs and the government actively used these protectionist measures to the fullest extent.

⁵⁷² As discussed in section '8.1.B: Application of Golden Shares and Associated Infringement Procedures' of this study.

In case C-367/98 the government on several occasions politically undertook not to employ GSs to EU investors. These commitments appear ill-fated in light of the unsuccessful compliance attempt of 1996 and subsequent application of GSs that effectively thwarted two cross-border transactions at the time when the case on relevant provisions of the LQP was already pending before the CJEU. The government also defended its veto resisting complying with binding decisions of the Commission on *BSCH/Champalimaud* and *Holderbank/Secil/CIMPOR* cases. Portugal has successfully maintained protectionist GS provisions of DL No.380/1993 and DL No.24/1994 for two decades. Fourteen months after the judgment the overruled GSs remained intact, which confirms that the infringement proceedings under Article 258 TFEU has been unsuccessful. Initial compliance measures failed to guarantee full compliance. Compliance has been achieved only when the infringement procedure under Article 260 TFEU has progressed to advanced stages. This post-judgment conduct confirms both hypotheses on the effectiveness of enforcement system (H1 and H2), as well as the supporting hypothesis on effectiveness of minimalist compliance (H1a). One of the main reasons for ultimately reaching compliance in this case could be the fact that other GSs were readily available to serve the government's protectionist aims. Since both the infringement proceedings and the condemning judgment failed to persuade the Portuguese government on the necessary policy reform on GSs, the hypothesis on effectiveness of the agenda-setting case-law (H3) is confirmed.

Three of the latest cases C-171/08, C-543/08 and C-212/09 on GSs in *PT*, *EdP* and *GALP* respectively, have revealed significant resistance to compliance. The Portuguese government has blatantly disregarded of the obligations stemming from the Treaty, the judgments and the international bail-out agreement. In these cases special rights were also effectively used to veto cross-border transactions in spite of the government's claims before the CJEU that veto has never been used. Imposing a veto mere days before the condemning judgment and subsequent statements of the government's officials defending this move represents conduct explicitly contrary to the sincere cooperation obligation. Such disrespect for the EU's law stands out as one of the gravest cases of obstructionist non-compliance. In all the three cases non-compliance with the judgments is seen as action in bad faith, taken the government's disregard of penalty procedures – particularly in light of the numerous commitments to comply. As a result in both cases C-543/08 and C-212/09 the Portuguese

government could be seen as resorting to obstructionist non-compliance in bad faith, so the working enforcement effectiveness/obstructionist hypotheses (H1, H2 and H3) of this study are confirmed for these cases.

Portugal has been rescued by financial assistance from the EU yet it did not preclude the national government from continuous obstructionist and non-compliance with EU law. Here it should be emphasised that the fact that Portugal has been forced by the EAP to remove its GSs should not be understated, since all of the compliance initiatives came as a result of extreme economic, financial and political pressures. It should also be emphasised that the Commission had demonstrated great loyalty to this MS in distress by not pushing the two non-compliance infringement proceedings on GS judgments on *EdP* and *PT* cases to the adjudication stage. In this light, Portugal's overall compliance performance is not short of being one of the most extreme cases of bad faith behaviour. In this context the Commission appears to be 'the good', Portugal 'the bad' and its forced compliance deal – 'the ugly'. Portuguese conduct in compliance with the CJEU's judgments on GS cases supports the hypothesis on obstructionist non-compliance, revealing that GSs could be of extremely obstructionist character and a MS could willingly act in bad faith towards its obligations.

To conclude, it is necessary to emphasise that following the national economic struggle to overcome financial crisis, which to some extent has been caused by the Portuguese government's unwillingness to play by the free market rules, the state has been forced to embark on extensive disposal of the remaining stakes in 'national champions'. Shareholdings in *PT*, *GALP* and *EdP* – companies which earlier were perceived as strategic and vital for the national economy – were sold off to the third-country buyers and companies became targets to foreign takeover bids.⁵⁷³

⁵⁷³ See e.g. *Financial Times* (11/04/2012); *Financial Times* (22/10/2012).

PART III. CONCLUSIONS

1. Outline

The MSs have voluntarily and democratically committed themselves to comply with EU law while also voluntarily agreeing to delegate adjudicatory powers to the CJEU. The very essence of the Union rests on the MSs' sincere willingness to respect the supremacy of the EU *acquis*, to cooperate and to comply in good faith with EU law. In accordance with the sincere co-operation principle, every MS must be ready and willing to accept the obligations and requirements deriving from EU membership, which include the obligation to comply with judgments of the CJEU. Non-compliance with condemning judgments could be seen as crossing the red line. This study has assessed the latter kind of compliance obligations, emphasising that non-compliance with judgments on GS cases could be particularly significant, as the protectionist aims of these barriers could be effectively achieved by other legitimate means readily available under the provisions of the EU Takeover Directive. The aim of this study was not to delineate or give reasons for non-compliance with CJEU judgments on GSs, but to assess factual compliance with the whole body of the said jurisprudence. Here, it is pertinent to emphasise that even though non-compliance with the condemning judgments of the highest legal authority of the EU could be seen as grave misconduct on the part of MSs, in cases where the Court oversteps the boundaries of its competence, such national resistance to accept the judicial interpretation of the Treaty provisions could be justified to some extent.

The GS-related case-law constitutes only a small fraction of all the infringement cases brought to the Court under general infringement proceedings. At the same time, GS jurisprudence has played a major role in the development of the fundamental freedom of capital movement. These cases have raised a number of important and politically sensitive questions: it is true to say that through these judgments the CJEU can be seen to be promoting a competition-centred and shareholder-oriented philosophy of the single market, and promoting the establishment of a level playing field in the market for corporate control. All these legislative developments may be seen as a threat to the diversity of national economic regimes and to the diversity of national industrial relations, which in turn could result in non-compliance post-judgment. Despite the importance of the GS-related case-law for the development of EU law, the Court's adjudicative success

has never been tested through an analysis of the effectiveness of post-adjudicative compliance.

Non-compliance with GSs cases brings the matter of non-compliance with the core single market laws on free movement of capital and establishment to new heights, which up until now has been barely assessed in a systematic and coherent way. The core objective of the present work was a fact-finding mission aimed at closing the identified gap by systemically analysing post-adjudicative compliance with GS judgments. This study has striven to assess the effectiveness of the EU enforcement system in general, and the effectiveness of the EU judicial system in particular, when applied to GSs. The argument is that in some cases the MSs do everything they can in order to defend GSs and to shield companies from cross-border takeovers.

Part II of this study has evaluated the post-judgment compliance initiatives and their legislative outcomes in order to reveal under which conditions CJEU judgments and penalty procedures are likely to be effective. By engaging in careful process-tracing, this study has shown that the instruments of the EU enforcement system are only sometimes effective in facilitating due compliance, and that in the majority of cases GS jurisprudence does not produce a considerable policy shift in national attitudes towards GSs, leaving the MS disrespecting the rule of law of the EU. This study has revealed generally that effective compliance with GS judgments can be envisaged only when MSs are exposed to the threat of coming before the CJEU for the second time under the penalty procedure. Non-compliance with the provisions on free movement of capital and the subsequent judgments of the CJEU aimed at enforcement of these freedoms could be a matter of protectionist priorities deriving from national, political and economic choice. This study showed that governments could be keen to continue limiting free capital movements even following the condemning judgments of the CJEU – and such non-compliance could be seen as crossing the red line. The findings are summarised below.

2. Findings

This study analysed in total *eighteen* judgments which related to GSs and were delivered between 2000 and 2013. The analysed judgments comprised of *fifteen* judgments which have established that GSs are incompatible with the Treaty including: *Commission v Italy* (C-58/99, C-174/04, C-326/07), *Federconsumatori*, *Commission v Spain* (C-463/00, C-274/06, C-207/07), *Commission v United Kingdom* (C-98/01), *Commission v France* (C-483/99), *Commission v Netherlands* (joined cases C-282/04 and C-283/04), *Commission v Germany* (C-112/05), *Commission v Portugal* (C-367/98, C-171/08, C-543/08, C-212/09); *one* judgment which condemned the application of GSs in *Commission v Spain* (C-196/07); *one* judgment which justified GSs in *Commission v Belgium* (C-503/99) and *one* that assessed Germany's compliance with *Volkswagen* judgment – *Commission v Germany* (C-95/12). Further sanction threats under Article 260 TFEU were applied in *twelve* cases out of total *fifteen* judgments, namely in three Italian (C-58/99, C-174/04, C-326/07), four Portuguese (C-367/98, C-171/06, C-543/08, C-212/09), the UK, German, and three Spanish cases (C-463/00, C-207/07, C-196/07). This large number of penalty procedures signifies that the MSs failed to comply with GSs rulings following the first round procedure of Article 258 TFEU. Only in *three* cases (Netherlands, France and the UK – despite communicational issues which led to second round procedure) out of *fifteen* GS-related judgments under Article 258 TFEU did the procedure culminate in *clear-cut compliance*. In other instances the MSs engaged in at least some sort of non-compliance behaviour, resisting full compliance with the Court's judgments. These findings confirm that a GS judgment by itself is barely enough to ensure effective policy adjustments at national level and effective compliance. In majority of the cases the MSs have not complied in a timely and comprehensive manner and non-compliance persisted for several years. The following table summarises the findings of this study.

Table 2: *Summative Findings*

List of 18 judgments of the CJEU on cases that related to GSs	Article 260 TFEU	Hypotheses			
		H1	H1a	H2	H3
<i>C-58/99 Commission v Italy</i>	yes	yes	yes	yes	yes
<i>C-174/04 Commission v Italy</i>	yes	yes	yes	yes	yes
<i>C-326/07 Commission v Italy</i>	yes	yes	yes	yes	yes
<i>Federconsumatori (1)</i>	n/a	n/a	n/a	n/a	yes
<i>C-463/00 Commission v Spain</i>	yes	yes	yes	yes	yes
<i>C-274/06 Commission v Spain</i>	no	yes	yes	n/a	yes
<i>C-207/07 Commission v Spain</i>	yes	yes	yes	yes	yes
<i>C-196/07 Commission v Spain (2)</i>	yes (2)	yes	yes	no	yes
<i>C-98/01 Commission v UK</i>	yes	no	n/a	n/a	no
<i>C-483/99 Commission v France</i>	no	no	n/a	n/a	no
<i>C-503/99 Commission v Belgium (3)</i>	n/a	no	no	n/a	no
<i>C-282/04 and C-283/04 Commission v Netherlands</i>	n/a	no	n/a	n/a	no
<i>C-112/05 Commission v Germany</i>	yes (C-95/12)	yes (5)	no (5)	no (5)	yes
<i>C-95/12 Commission v Germany (4)</i>	n/a	n/a	n/a	n/a	n/a
<i>C-367/98 Commission v Portugal</i>	yes	yes	n/a	yes	yes
<i>C-171/08 Commission v Portugal</i>	yes	yes	n/a	yes	yes
<i>C-543/08 Commission v Portugal</i>	yes	yes	n/a	yes	yes
<i>C-212/09 Commission v Portugal</i>	yes	yes	n/a	yes	yes
in total of 15 judgments the Court found that GSs are incompatible with the Treaty					
Cases with hypotheses approved	12	12	7	9	13

(1) Preliminary judgment where GSs were not justified

(2) Judgment challenging use of GSs

(3) GSs justified

(4) Judgment challenging compliance with C-112/05

(5) taken that the remaining GSs are not challenged by the CJEU

As predicted by the supporting hypothesis on minimalist compliance (H1a) if the governments complied ‘by amendment’ the compliance strategy resulted in inadequate or incomplete compliance and GSs retained their protectionist powers post-judgment. Such minimalist compliance strategy subsequently triggered second round infringement proceedings under Articles 260 TFEU. As predicted by the hypothesis on the effectiveness of second round enforcement action (H2), in the majority of cases the MSs have complied only at the later stage of the procedure, when the liability for non-compliance and the imposition of deterrent penalties became imminent or foreseeable. This finding reveals that GS-related judgments do not bring the necessary change and MSs only consider removing GSs when they face imminent penalty threats under Article 260 TFEU.

Finally, the study shows that MSs have repeatedly failed to embark on the wider policy change, consequently supporting the hypothesis on the effectiveness of the agenda-setting case-law (H3).

Some factors proved to have a decisive impact on compliance while others proved to be of doubtful or non-measurable impact. For example, this study anticipated that cooperation during the enforcement would point towards the MSs’ inclination to duly comply post-judgment. In some cases, despite the due cooperation prior to the condemning judgment, MSs have failed to comply once the judgment has been issued. In a similar vein, some MSs (which have a better overall compliance record) failed to promptly comply, while others, with less positive compliance records, complied in good faith. In this light the MSs’ political and economic power, its legal traditions or historic prerequisites to state-driven *dirigisme* and presence of the powerful CEMs did not explain why in some cases the governments had effectively complied, while in others resisted. This study anticipated that in some cases the longer the MS maintained GSs the better they would comply, such was the case in the UK and France. However in other cases the longest-standing GSs revealed significant obstructionism (as in Portugal and Germany). This study has revealed that non-compliance is more likely to occur in certain MSs, such as Spain, Italy and Portugal. General studies on compliance assume that neither Portugal nor Spain persist in non-compliance. Contrarily, this study revealed that when it comes to GSs both Spain and Portugal significantly resisted compliance. The conclusive analysis of the findings is summarised in the following section.

3. Conclusive Analysis

This study has argued that because GS judgments can be seen as an attack on the national systems of corporate governance and national sovereignty, MSs could attempt to undo or limit the expansionist effects of the CJEU case-law by resorting to non-compliance post-judgment, which could be seen as a form of sanctioning. This study has demonstrated that CJEU jurisprudence on GSs is an area where non-compliance is a significant problem since the position of MSs is indefensible. The following paragraphs summarise the arguments on why the MSs' position is indefensible and why non-compliance with GS jurisprudence can be seen as crossing the red line.

Before turning to an analysis of compliance with GS judgments (developed in Part II), this study first reflected on the competing interests and values at both national and Union levels which could potentially explain non-compliance with GS judgments (Section 2). This study has revealed that non-compliance with GS jurisprudence could emerge from the clash of national interests (protection of the public good, policy and security) and the aims of the Union (promotion and development of market liberalisation). Put simply, the clash could be seen as one between national interests and the incursion of the single market into the sensitive area of strategic industries. From the outset, this study has acknowledged that due to the significant differences existing at national levels and due to the diverse interests and values which the MSs are obliged to protect, the Treaty provides for exceptions, allowing MSs not to comply with fundamental freedoms in order to protect legitimate interests. It could be argued that MSs should have significant powers to regulate sectors which are of fundamental importance for the public in order to safeguard them against unpredictable market forces. In this sense, GSs represent not only barriers to capital movements but also a state guarantee aiming to safeguard strategic companies that provide services of general interest. However, any such safeguarding imperative must adhere to the Treaty principles – hence the clash of interests and imperatives which could potentially result in non-compliance.

Subsequently, as the nature of GSs was being revealed in Section 3, it became evident that the perceived clash of the EU and national interests was not so significant as to cause severe non-compliance post-judgment due to the two mitigating factors. First, it has been revealed that the governments themselves are free to decide on the level to which their national companies operating in strategic

industries are exposed to liberalisation, foreign competition, and a level playing field. This study has emphasised that MSs have freely decided to withdraw from ownership of strategically important companies through privatisation and voluntarily choose not to retain a blocking minority stake which could effectively and legitimately protect any strategic national interest, such as security of supply and public policy. Following this logic, this study considers that since MSs voluntarily pursue economic policies which bring ‘more market’ into their sensitive industries, there should not be significant resistance to comply once their initial imperative for ‘more market’ is subsequently confirmed by the CJEU.

The second factor which could preclude non-compliance with GS judgments by mitigating the clash of the EU and national interests is the fact that MSs could pursue the same protectionist aims by regaining or re-nationalising the blocking minority stake in strategic companies. By re-nationalising of the blocking minority stake, which under the EU Takeover Directive could allow for the same level of influence as GS measures, MSs could both retain the sought-after control of sensitive and strategic industries and respect the rulings of the highest legal authority of the EU. However, despite the availability of such a legitimate option for the protection of national interests and values, MSs first choose not to comply with the fundamental freedoms of the Treaty and then, after the GSs have been proven to be illegitimate by the CJEU, choose to resort to non-compliance post-judgment by turning to the compliance ‘by amendment’ strategy. Such a strategy has proven to be ineffective, with little potential for success, since the level of protection that the MSs have striven to retain following the GS judgment equals the level of the blocking minority shareholder. The following paragraphs summarise why the compliance ‘by amendment’ strategy could be seen to be unacceptable for compliance with GS judgments.

It is very difficult to pass the legal certainty and proportionality test. If it were otherwise, the MSs would have long amended their GSs without needing to enter legislative battle with the EU Commission. There could be two outcomes of the compliance ‘by amendment’ strategy: one that is effective in facilitating compliance, and another that is insufficient. Following the amendment, the GSs would either (a) provide for significantly less protection as proportionality and legal certainty increase, or (b) they would retain the same amount of protectionist powers while significantly improving legal certainty. The former compliance ‘by amendment’

strategy could be potentially acceptable for effective post-judgment compliance. However, such a strategy is undesirable for the MSs, as they seek to retain effective protection equal to the level of the blocking minority shareholder. Hence, any protection that is less powerful would generally fail to guarantee the stated aims of public policy protection. The latter compliance ‘by amendment’ strategy is unacceptable in guaranteeing effective compliance with the judgment. However, this strategy is desirable for the MSs, as they seek to win the race against time by retaining powerful GSs to block undesirable FDIs, while at the same time attempting to pacify the Commission by increasing legal certainty. Consequently, as this study has demonstrated, any post-judgment amendment of illegitimate GSs would show the MSs to be striving to preserve the powers of a minority shareholder, which results in ineffective compliance and unnecessary procrastination.

Given the voluntary nature of the national political undertaking to bring ‘more market’ into national strategic companies via privatisation, and given the availability of alternative means to protect the stated public policy interests via the re-nationalisation of majority stakes, this study concludes that non-compliance with the condemning judgments on GSs could be seen as crossing the red line and gravely disregarding the limits of discretion provided for in the Treaty.

Evidence shows that when it comes to compliance with GSs judgments, MSs are often resorting to procrastination, minimalist compliance strategies or inaction. This study has demonstrated that if a MS is determined to delay compliance, it could play with the enforcement system by stretching the infringement procedure. It has been shown that replies to official correspondence are often delayed or are issued at the very end of the set deadline. In cases when the national government is strongly opposed to the Courts’ judgment, it could find the way to circumvent the full force of EU law. This particularly applies to situations when the state is strongly opposed to particular cross-border deals. Despite the fact that the Commission actively challenged protectionist measures, GSs are seen as a success in MSs’ battle against unwelcome M&As, such as *CIMPOR* in Portugal, *Endesa* in Spain, *Telecom Italia* in Italy and *Volkswagen* in Germany. Often the erring MSs were proved to be very keen on using GSs when the matters concerned strategic companies and possible takeover threats. Political undertakings to not employ GSs can’t be accepted in this light, since it is now clear that GSs measures are most likely to be applied if available.

Such a situation on post-judgment compliance renders enforcement system of Articles 258/260 TFEU a weak compliance mechanism when the matter concerns GSs. These findings indicate that non-compliance is widespread when it comes to GS cases, with half of the MSs featured in this study resorting to non-compliance (of some sort at least). What this study has clearly demonstrated is that the enforcement system is efficient in facilitating comprehensive compliance only in those cases when the judgment resonated well with the on-going national policies on GS removal (like the UK, France and the Netherlands). Only in cases when the MSs considerably rolled back the state participation in economy and have extensively employed the ‘state-withdrawal’ ideology, only then the EU institution’s policy-setting fitted well into national interest. This study has also demonstrated that MSs would also comply when the GSs’ objectives have been already achieved, so there is no need for GSs anymore. In this light the Commission’s assessment of compliance with GSs is not as triumphal as perceived.

This study has confirmed that the Commission’s law enforcement mission faces a number of drawbacks when it comes to effective compliance with GS judgments. First, the enforcement system of Articles 258 TFEU could be seen as too cumbersome and lengthy when applied in the case of GSs – when it comes to such a time-sensitive issue as a cross-border M&A. Resistance of MSs to comply with CJEU judgments on GSs poses an immediate threat to the freedom of capital movement. Not only does it inhibit shareholder’s rights but it also threatens the integrity of the single market – the core aim of the EU. Non-compliance with GS judgements reveals that MSs could fail in their basic duty to uphold the rule of law when it comes to the implementation of the CJEU’s judicial policy-making in the sensitive area of strategic industries. It reveals that national interests could outweigh the interests of the Union, and fundamental freedoms could be overshadowed by the necessity to protect other values and interests. Such resistance to comply could be seen as action in bad faith towards loyalty to the EU principle. These findings reveal a serious compliance deficit which undermines the core idea of the EU – the building of a union without barriers. The following section will comment on the recent developments in the area of GSs case-law while also outlining prospects for the future.

4. Concluding thoughts and future directions

Non-compliance with judgments on GSs is one of the central issues which have been on the Commission's agenda for fourteen years. As early as in 2005 the Commission confirmed that MSs 'cooperated successfully', achieving 'a good level of understanding' on the GSs issue.⁵⁷⁴ Following the 2002 judgments, many commentators suggested that most of the GSs are now going to be turned down. However this study demonstrated that the battle over GSs is far from being over and it could be envisaged that both the Commission and the Court will encounter many more such cases in the future. The CJEU's GSs rulings may have forced some governments to reconsider GSs mechanisms in the areas of lesser strategic importance, but that does not mean that these national measures would disappear altogether. The newer MSs have brought with them another array of GSs stemming from legacy of widespread privatisations. Many of these GSs are there to remain and they are yet to be challenged. Privatisation is still continuing, as previously closed sectors such as postal services are being opened to competition. Consequently, unjustified GSs represent a serious hindrance to free movement of capital and a genuine free market is not a reality since some GSs are maintained and applied.

Non-compliance with GS judgments furthers differentiation within the Union, and too much differentiation could prove to be disastrous for the whole EU project that aims for more unity. Non-compliance with GS judgments is what market participants see, and this could further undermine the credibility of the MSs' commitments under the Treaty and the credibility of the single market as a whole. By resisting to remove GSs following condemning judgment, the MS in question could be seen as to be not striving to protect legitimate interests, but simply to be defying the single market project. If the protection of social policy was the true reason to implement GSs, why would the MS withdraw from minority stake ownership in the first place and why would it subsequently refrain from regaining control by acquiring a 25% blocking minority stake, for instance? In this light, non-compliance could be a dangerous path to take – if MSs themselves question the desirability of the single market, how could companies and citizens believe in it?

Non-compliance with GS judgments is ever more revealing at the time of the recent financial and sovereign debt crisis. The MSs' desire to protect public policy interests by means of GSs and subsequent non-compliance post-judgment (dressed

⁵⁷⁴ European Commission, SWD (2005), *supra* note 25.

up as a means to uphold protection of public interests and values) appears to be little more than an alibi. When the crisis struck, GSs showed themselves as a true double-edged sword, since with control also comes liability. It could be argued that when a company is protected by GSs and when such a company is in financial difficulties, rescue in the form of a potential M&A deal would not be an option, as potential investors would be significantly discouraged, knowing that the government's GS would prevent them from taking full control of the company in question. The Portuguese government has been eager to sell *EdP*, *Cimpor* and *Portugal Telecom*, which, following the crisis, have been heading for decline. In this light, it seems that all the non-compliance with GS rulings has not been the result of the MSs' sincere willingness to protect public interests, but pure national protectionism rooted in deliberate political choice which, as Rickford (2010: 54) puts it, could be seen as an 'assertion of selfish interests in defiance of market forces' which aims to 'insulate national markets from foreign competition, mainly in markets for capital and corporate control (often dressed up as social policy)'.

Several solutions are given below which could diminish the negative impact of GSs on FDI following a condemning judgment. Firstly, one of the obvious solutions to preclude and limit GSs' negative impact on the free market is to monitor compliance process more closely, scrutinising national compliance initiatives at the early stages of their drafting. Additionally, the infringement proceedings could be streamlined solely for GS jurisprudence, which would encourage MSs to comply faster. MSs must also be constantly reminded of their duty to cooperate in good faith under Article 4(3) TEU. Secondly, in cases when GSs directly impede cross-border deals the Commission could introduce special automatic injunctions which would allow for the precluded FDI deals to go through despite the existing GSs barriers. Thirdly, and most importantly, another possible solution to promote compliance with GS judgments is to promote the effectiveness of the enforcement mechanism of Article 260 TFEU by imposing automatic penalties for this body of case-law. For this purpose, the instance of Portugal's compliance with GS rulings, which came as a result of a bail-out deal, could be particularly revealing. It clearly demonstrates that in the case of significant distress and utmost necessity, all the allegedly justifiable defences for non-compliance with CJEU judgments (such as the obligation to protect social values and public policy interests) could be set aside and compliance would be achieved swiftly with no unnecessary delays. In addition,

given that the compliance ‘by amendment’ strategy is unlikely to facilitate effective compliance with GS judgments (otherwise the breach would be remedied before the judgment) and that the stated public policy objectives could be legally facilitated by regaining the 25% minority shareholding, penalties under Article 260 TFEU could be automatically applied following the GS judgment. Such a radical suggestion for automatic penalties stems from the findings of this study, which reveal that non-compliance with GS rulings is a policy choice that could be seen as crossing the red line.

In the conclusion it must be emphasised that at the time of the writing some of the most obstructionist GSs continued to shine. A large number of significant corporate M&As in the EU could not materialise due to various GS arrangements being in force – *E.ON/Endesa*, *Porsche/Volkswagen* among them. The fact that these transactions have failed for non-economic reasons and against the will of shareholders clearly goes against the very spirit of the single market. The decisive point is that European Union depends upon sincere cooperation and compliance of MSs with judgments of the CJEU, but in today’s times of increased nationalism and economic instability, questions of national loyalty to the EU are being voiced from different sides. The cases analysed during this study might represent just a tip of an iceberg. The overall conclusion is that given the continuous existence of GSs, the fact that these measures are still on the CJEU’s agenda⁵⁷⁵ and in light of current ‘protectionist climate’, it is too early to say goodbye to GSs and this is still not the ‘end of an era’ (Brophy 15/07/3003) nor the end of a ‘golden age’ (Brophy 19/06/2003; Camara 2002).

⁵⁷⁵ Case C-244/11 *Commission v Greece*, note 39.

ANNEX I

Provisions of the Treaty on the Functioning of the European Union (TFEU)

THE INTERNAL MARKET

Article 26

1. The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the Treaties.

2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

RIGHT OF ESTABLISHMENT

Article 49

Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.

Article 54

Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Union shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

“Companies or firms” means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

Article 55

Member States shall accord nationals of the other Member States the same treatment as their own nationals as regards participation in the capital of companies or firms within the meaning of Article 54, without prejudice to the application of the other provisions of the Treaties.

CAPITAL AND PAYMENTS

Article 63

1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.

Article 65

1. The provisions of Article 63 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national provisions laid down by law or regulation, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

GENERAL AND FINAL PROVISIONS

Article 346

1. The provisions of the Treaties shall not preclude the application of the following rules:

(a) no Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security;

(b) any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material; such measures shall not adversely affect the conditions of competition in the internal market regarding products which are not intended for specifically military purposes.

ANNEX II

Provisions of the Treaty on the European Union (TEU) – as amended by the Treaty of Lisbon in its EU Official Journal version dated 17 December 2007

Article 4 TEU

1. In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the MSs.

2. The Union shall respect the equality of MSs before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each MS.

3. Pursuant to the principle of sincere cooperation, the Union and the MSs shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The MSs shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The MSs shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

ANNEX III

Provisions of national legislation

Italy

Constitution of the Italian Constitution

Article 43

‘For the purposes of the common good, the law may establish that an enterprise or a category thereof be, through a pre-emptive decision or compulsory purchase authority with provision of compensation, reserved to the Government, a public agency, a workers' or users' association, provided that such enterprise operates in the field of essential public services, energy sources or monopolies and are of general public interest’.

Spain

Non-official translations

Royal-Decree Law No.4/2006 of 24/02/2006 (BOE No.50 of 28/02/2006, p.8016)

1.º The safety and quality of the supply understood as constant physical availability of market products and services at reasonable prices in the short and long term for every user, independently of their geographic location; as well as:

2.º The safety against a risk of investment or an inadequate maintenance of the structure that does not allow to ensure, on a continuous basis, a minimum set of services required to ensure the supply.»

‘The Draft Law Creating the National Commission on Markets and Competition’ No.121/000028 of 19/10/2012 (BOCG-10-A-28-1, X Leg., No.28-4, Series A of 4/04/2013).Transposed into Law No.3/2013 of 4/06/2013 (BOE No.134 of 5/06/2013)

Additional provision ninth. Functions assumed by the Ministry of Industry, Energy and Tourism energy.

The Ministry of Industry, Energy and Tourism will undertake the following functions:

1. In the electricity sector.

a) To inspect, within its scope of competence, the fulfilment of the technical conditions of the facilities, the fulfilment of the requirements established in the authorizations, the correct and effective use of indigenous coal at power plants with the right to charge the fee for indigenous coal consumption, the economic situation and actions of the individuals as long as they affect the application of fees, prices and payment criteria of power activities, the effective availability of the generation facilities under the ordinary regime, the correct invoicing and selling conditions of trading and distributing companies and qualified clients, the continuous supply of power, the services quality, as well as the effective division of the abovementioned activities when required.

b) To agree to the submission of penalizing files and prepare their instruction procedure, when it is under the jurisdiction of the General Administration of the State and their filing suit or instruction are not under the jurisdiction of the CNMC (National Commission for Markets and Competition); and to report, when requested, on any penalizing file submitted by the different Public Administrations.

c) To report, assist and proceed, in coordination with jurisdictional administrations, through protocols for implementation, with the claims submitted by power consumers, and to provide the latter with all the necessary information related to their rights, the enforceable legislation and the ways available to solve their conflicts in case of litigation.

The Ministry shall report to the CNMC, at least once a semester, on any action submitted, including the data of the number of claims reported, assisted and processed, for the purpose of facilitating its monitoring tasks on the operations of retail markets.

d) To estimate the liquidations of power transportation and distribution costs, the system constant costs and any other cost established for the whole system – when these liquidations are specifically ordered, and send to the CNMC all the necessary information to create toll methods.

e) To monitor the activity of the Office of Supplier Changes.

...

2. In the hydrocarbon sector.

a) To inspect, within its scope of competence, the fulfilment of the technical conditions of the facilities, the fulfilment of the requirements established in the authorizations, the economic situation and actions of the individuals while they affect the application of fees, prices and payment criteria of hydrocarbons, the effective availability of gas facilities, the correct invoicing and selling conditions to the consumers of distributing companies – as regards access to networks – and trading companies, the continuous supply of natural gas, the services quality, as well as the effective division of the abovementioned activities when required.

b) To agree, within the scope of the enforceable Law, to the submission of penalizing files and prepare their instruction procedure, when it is under the jurisdiction of the General Administration of the State; and to report, when requested, on those penalizing files submitted by the different Public Administrations, without prejudice of the jurisdiction conferred to the Corporation of Strategic Reserves of Oil Products in Section 52.4 of the abovementioned Law, or the exclusive jurisdictions of other Public Administrations bodies.

c) To estimate the liquidations regarding the profits obtained from tolls and fees related to the use of the Basic Network facilities, secondary transport and distribution referred in Section 96, and to notify the interested party/parties about them.

d) To report, assist and proceed, in coordination with jurisdictional administrations, through protocols for implementation, with the claims submitted by natural gas consumers, and to provide them with all the necessary information related to their rights, the enforceable legislation and the ways available to solve their conflicts in case of litigation

The Ministry shall report to the CNMC, at least once a semester, on the actions submitted, including the data of the number of claims reported, assisted and processed, for the purpose of facilitating its monitoring tasks on the operations of retail markets.

e) To issue certificates and to manage the certification methodology of biofuel consumption and selling.

f) To monitor the activity of the Office of Supplier Changes.

g) The jurisdictions granted by the enforceable regulations to the National Energy Commission as regards liquid hydrocarbons.

3. As regards the power and hydrocarbon sectors: to have knowledge about partitions taking within the power sector.

Law No.62/2003 (BOE No.313 of 31/12/2003)

4(4) The administrative procedure referred in the previous paragraph may end by the submission of an agreement with the features of the understanding or social action subject to approval, which may be proposed by the current Administration or the interested party/parties.

4(5) The following interrupt, in any case, the estimation of the period of time established in the first paragraph of this Section:

a) The requirement of a remedy for the deficiencies or insufficiencies of the notice, especially regarding the data about the concerned social actions or agreements features, until they are duly fulfilled. This requirement shall only be practised once.

b) The submission of an agreement proposal by the Administration and until it is accepted or denied by the interested party/parties.

c) The intervention of the European Union body competent as regards the assumptions included in the scope of the application of Rule CEE 4064/89, amended by Rule CEE 2367/90, and for the adoption of any of the decisions disposed in these rules.

d) The submission of an inquiry to the competent European Union body by the respective state body in the case of merging, division or transfer of a property or the use of company assets, and applying the European Union rules previously mentioned in paragraph c).

4(6) The competent body shall be deemed not to be opposed to the operation or decision notified if, once finished the period established in paragraph 1 of this Section, a decision has not been notified.

5(e) The risk of the financial structure of the operation that may lie upon the activities of the entity subject to these rules and upon the resources obtained by these activities, especially about regulated profits transferred to activities different from the ones originating them.

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